FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

FILED

MAR 7 1970

JOHN F. DAVIS, CLERK

No. 1290

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Petitioners,

v.

THE HONORABLE ROY W. HARPER, Judge of the United States District Court for the Eastern and Western Districts of Missouri,

Respondent.

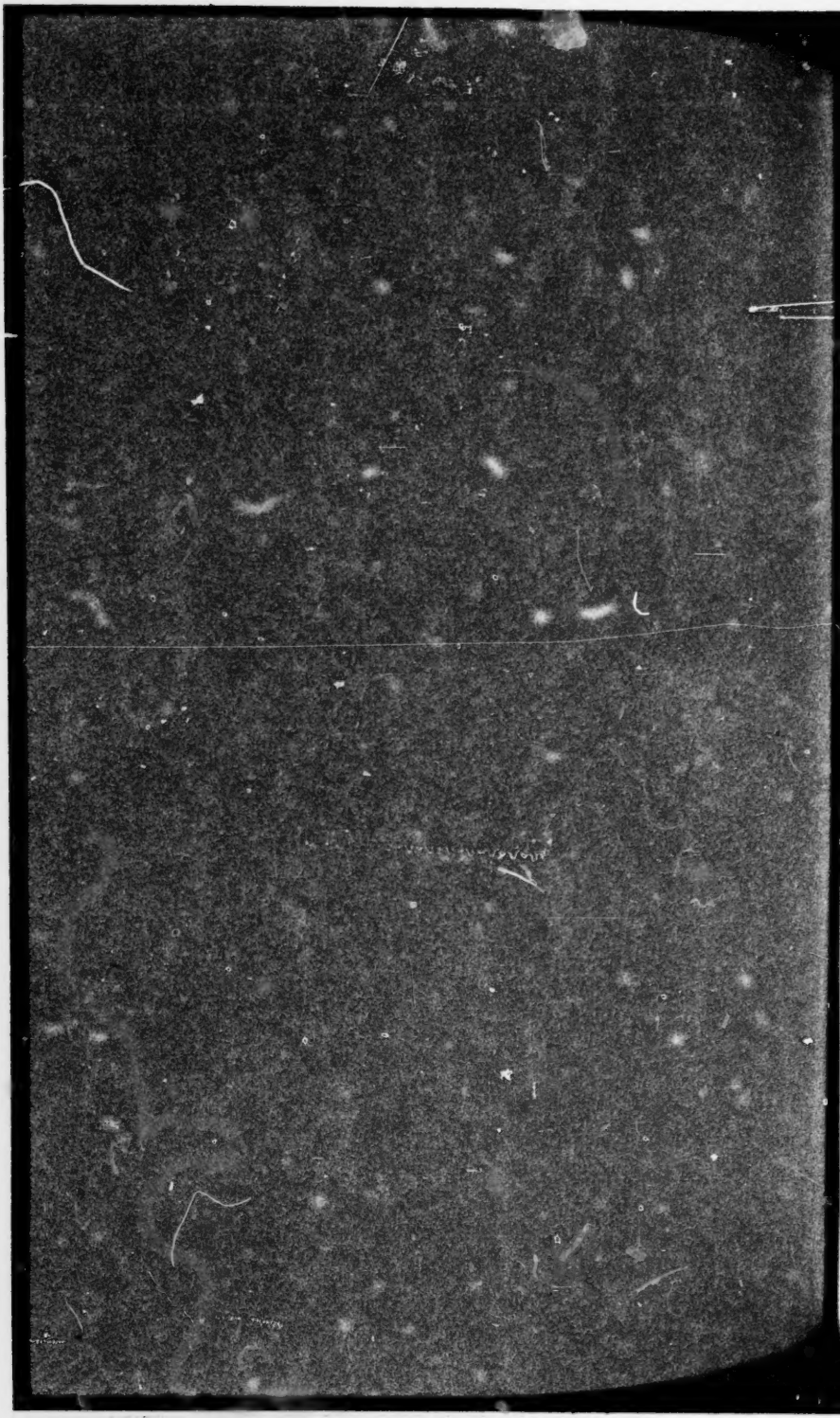
Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

NICK C. SPANOS
6404 Wilshire Boulevard
Los Angeles, California 90048

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioners

CADILLAC PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220



INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT. 16

CONCLUSION. 37

APPENDIX A-1

CITATIONS

Cases:

American Cyanamid Company v. F.T.C.,
363 F.2d 757 (6th Cir. 1966) 34, 37

American Steel Barrel Co., Ex parte,
230 U.S. 35 (1913) 24

Berger v. United States,
255 U.S. 22 (1921) 2, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26

Boyance v. United States,
275 F. Supp. 772 (D.C. Pa. 1967) 23

Craven v. United States,
22 F.2d 605 (1st Cir. 1927) 31

Gallarelli v. United States,
260 F.2d 259 (1st Cir. 1958) 23

Page

Green v. McElroy,
360 U. S. 474 (1959) 31

Henry v. Speer,
201 Fed. 869 (5th Cir. 1913) 23

Honolulu Consol. Oil Co., In re,
243 Fed. 348 (9th Cir. 1917) 28

Jones v. Liberty Glass Co.,
332 U. S. 524 (1947) 24

Los Angeles Trust Deed & Mortgage Exchange v. S.E.C., 285 F.2d 162
(95th Cir. 1960) 12

Lyons v. United States,
325 F.2d 370 (9th Cir., 1963) 23

McClaughry v. Deming,
185 U. S. 49 (1902) 34

Martin v. Texas Indemnity Insurance Co.,
214 F. Supp. 477 (N. D. Tex. 1962) 36

Minnesota & Ontario Paper Co. v. Molyneaux,
70 F.2d 545 (8th Cir. 1934) 16

Murchison, In re.,
349 U. S. 133 (1955) 17, 37

Oakley v. Aspinwall,
3 N. Y. 547 34

Rosen v. Sugarman,
357 F.2d 794 (2d Cir. 1966) 16, 23

Town of East Haven v. Eastern Airlines, Inc.,
293 F. Supp. 184 (D.C. Conn. 1968) 23

Tumey v. Ohio,
273 U. S. 510 (1927) 37

Union Leader Corporation, In re,
292 F.2d 381 (1st Cir. 1961) 12, 23

United States v. Bell,
351 F.2d 868 (6th Cir. 1965) 23

BLEED THROUGH POOR COPY

Page

United States v. Elgin, J. & E. R. Co.,
298 U. S. 492 (1936) 24

United States v. Grinnell Corp.,
384 U. S. 563 (1966) 20, 26, 31

United States v. Hanrahan,
248 F. Supp. 471 (D. C. D. C. 1965) 23

United States v. Hoffa,
382 F.2d 856 (6th Cir. 1967) 36

United States v. Hoffa,
245 F. Supp. 772 (E. D. Tenn. 1965) 23

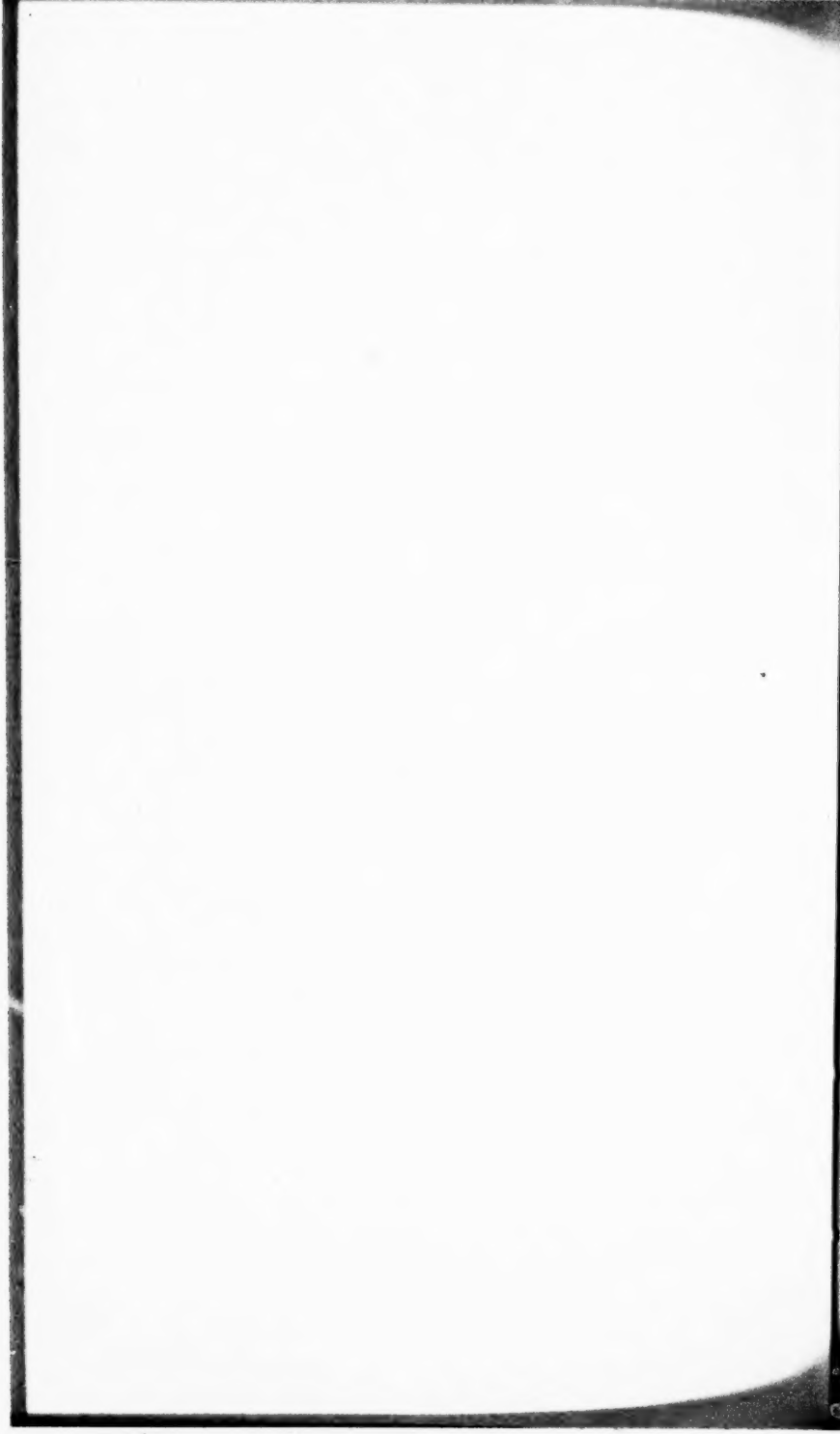
Wolfson v. Palmieri,
396 F.2d 121 (2nd Cir. 1968) 23, 31

Statutes:

28 U. S. C. § 144 . . . . . 4, 18, 19, 21, 35, 36
28 U. S. C. § 455 28
28 U. S. C. § 753(b) 32
Ariz. Rev. Stat. Ann. § 12-409 (1956) 21
Cal. Civ. Proc. Code § 170.6 (Supp. 1965). 21
Idaho Code Ann. § 1-1801 (1948) 21
Nev. Rev. Stat. § 1.230(5) (1957) 21
Ore. Rev. Stat. § 14.260 (1953). 21

Miscellaneous:

46 Cong. Rec. 2626-7 (1911) 21
Frank, *Disqualification of Judges*,
56 Yale L. J. 605 (1947) 22
Freeman, *Judgments* (5th ed. 1925) 33
Note, *Disqualification of Judges Because of Bias and Prejudice*, 51 Yale L. J. 169 (1941) 21
Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1434 (1966) 21, 30



BLEED THROUGH, POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JAMES A. MURRAY and EDITH B. MURRAY,
partners, doing business as NASSAU
CHINA COMPANY,

Petitioners,

v.

THE HONORABLE ROY W. HARPER,
Judge of the United States District
Court for the Eastern and Western
Districts of Missouri,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

---

The petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit, entered on December 9, 1969, denying a petition for a writ of mandamus and/or prohibition filed in the above-entitled cause.

OPINIONS BELOW

The Court of Appeals wrote no opinion in denying the petition for a writ of mandamus and/or prohibition. Its order of December 9, 1969, denying the petition is unreported and is reprinted in the Appendix hereto.

District Judge Roy W. Harper, the respondent herein, entered two memorandum opinions in denying petitioners' motion to change judge. Neither is reported. His memorandum opinion and order dated September 8, 1969, denying that motion, and his memorandum opinion and order of October 29, 1969, denying rehearing of the order of denial, are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit denying the petition for a writ of mandamus and/or prohibition, as to which review is hereby sought, was entered on December 9, 1969. This petition for a writ of certiorari was filed less than 90 days from the entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. §144 as interpreted in *Berger v. United States,* 255 U.S. 22 (1921), a federal district judge is automatically disqualified upon the filing of a good faith affidavit of prejudice by a party to the case.

2. Whether a federal district judge must disqualify himself, in accordance with 28 U.S.C. §144, upon the filing of good faith affidavit alleging the party's belief that the judge has shown a judicial bent of mind that may prevent or impede impartiality of judgment, that

BLEED THROUGH POOR COPY

belief being supported by the following reasons and facts set forth in the affidavit:

(a) That the judge had accepted his designation and had continued to participate and make rulings in the case without revealing the fact, which he was later forced to concede, that he is a member of a fraternity that has a direct interest in the outcome of the case and that has been named but not served as a defendant in the litigation.

(b) That the judge, without revealing the need for, the number of, or the contents of the discussions or whether other persons were present, concededly engaged in *ex parte* discussions about the case with another judge who had previously been forced to disqualify himself on charges of bias and prejudice filed by another party.

(c) That the judge, immediately upon his assignment to the case and by resort to sources entirely outside the record and that were not before him in the ordinary course of the litigation, acquired biased and partial prejudgments as to the facts and the law, in accordance with the views previously expressed by his disqualified predecessors and in favor of the opposing parties.

(d) That the judge had refused to make available or to permit the petitioners to examine an extrajudicial document from which he acquired his understanding of the prior lengthy proceedings and from which he formulated certain prejudicial and biased judgments about the case.

(e) That the judge, by persistently disregarding petitioner's request and rights, had exhibited a pattern of conduct and a lack of candor that manifest unfairness to the point of a denial of due process, such action being totally inconsistent with any concern to preserve impartiality.

3. Whether the provisions of 28 U.S.C. §144 that a party may file "only one such affidavit in any case" prohibits a party from filing an affidavit of prejudice where an affidavit had previously been filed by another party in a separate though related civil antitrust case, resulting in the disqualification of the predecessor judge in all the related cases. Whether, if there be such a prohibition, 28 U.S.C. §144 is consistent with the Due Process Clause of the Fifth Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, §144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[1]

---

[1] See 28 U.S.C. §452, as amended in 1963 (77 Stat. 248), which abolishes "terms" in the federal district courts and provides generally that the continued existence or expiration of a "session" of court "in no way affects the power of the court to do any act or take any proceeding."

BLEED THROUGH POOR COPY

STATEMENT OF THE CASE

The petitioners herein seek review of the Eighth Circuit's refusal to issue a writ of mandamus and/or prohibition directing that the respondent district judge, the Honorable Roy W. Harper, disqualify himself in accordance with 28 U.S.C. §144 from further participation in certain private antitrust proceedings pending in the United States District Court for the Western District of Missouri, Western Division, *Murray, et al. v. Balfour, et al.*, No. 737.

The proceeding out of which this problem arises is but one of thirteen related antitrust cases (referred to hereinafter as the Balfour cases) that have been extensively and bitterly contested and that have long been pending in the District Court below, the first two having been filed in 1959.[2] These various Balfour cases, including the instant one, essentially involve the claim by the respective antitrust plaintiffs that the L.G. Balfour Company, a leading manufacturer and distributor of college fraternity insignia and jewelry, conspired with various fraternities – including Phi Delta Theta, Delta Theta

---

[2] The first two of these 13 cases were commenced on February 20, 1959, when Sigma Chi and Phi Delta Theta fraternities, instigated by Balfour, filed separate trademark infringement actions against a small Missouri jeweler, who in turn filed antitrust counterclaims against each fraternity. The average "age" of all cases is more than 8 years. They were docketed in the District Court below as Nos. 683, 684, 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194. The petitioners' case, No. 737, has been pending since January 20, 1961. On October 17, 1969, the two fraternities dismissed their infringement actions and the counter-claims were simultaneously settled in consideration for the payment of a small sum.

Phi and Lambda Chi Alpha – to violate the federal antitrust laws to the injury of the respective plaintiff manufacturers and distributors of college jewelry. While these fraternities have been named as defendants in this litigation, none has actually been served. Moreover, during the pendency of this litigation, an independent proceeding before the Federal Trade Comission (Docket 8435) led to a determination in 1968 that the L.G. Balfour Company did violate the antitrust laws as alleged herein, a determination that is now pending on appeal to the Court of Appeals for the Seventh Circuit.[3] *L.G. Balfour Company, et al. v. Federal Trade Commission*, No. 17236 before the Seventh Circuit.

Prior Judicial History

In capsule form, the unusual and disturbing judicial history of the Balfour cases has been as follows:

(1) The Balfour cases were originally assigned to the Honorable Richard Duncan, then Chief Judge for the Western District of Missouri.

(2) Upon Judge Duncan's retirement in 1965, the cases were assigned to the Honorable John W. Oliver of the Western District of Missouri. Judge Oliver, however, in anticipation that an affidavit of bias would shortly be filed against him, recused himself on April 1, 1968, upon

---

[3] The law fraternity Delta Theta Phi, on May 29, 1969, sought leave of the Seventh Circuit to file a brief *amicus curiae*, alleging that its "rights" had been placed in jeopardy by the Federal Trade Commission determination. Judge Harper has admitted his membership in Delta Theta Phi, stating that "when I was in school I became a member of Delta Theta Phi legal fraternity." Supplemental Affidavit of Prejudice, p. 3.

BLEED THROUGH POOR COPY

the ground – as stated in his "Memorandum and Order of Transfer" – that he was a member of Phi Delta Theta Fraternity. That "Memorandum and Order of Transfer" is reproduced in the Appendix hereto.

(3) Judge Oliver's order of April 1, 1968, further directed that the Balfour cases be transferred to the Honorable William R. Collinson of the Western District of Missouri. But on July 3, 1969, Judge Collinson issued an order – reproduced in the Appendix hereto – sustaining a motion for change of judge and disqualifying himself from further participation in the Balfour cases. That order was made in response to an affidavit of bias and prejudice filed by J.A. Buchroeder & Company, by its president and chief stockholder, in Cases Nos. 683, 684 and 729, in which it was the party plaintiff. In that affidavit it was alleged that Judge Collinson was a member of Lambda Chi Alpha Fraternity, a named defendant in the Balfour cases; and it was further alleged and never denied (even for the record) that Judge Collinson had made biased determinations and had improperly attempted to influence the decision of another judge in another district in a related matter so as to secure a determination favorable to the defendant Balfour.

(4) While not directly involved in the history of the litigation in the District Court below, it is noteworthy that in a related antitrust case in the United States District Court for the Central District of California, *J.A. Meyers & Co. v. Lloyd G. Balfour, et al.*, Civil Action No. 67-118 – IH, in which many of the college fraternities here involved have been named as party defendants, District Judge Irving Hill found it necessary to recuse himself because he was "a life member of one of the defendant fraternities, friendly with its national officers, recipient of a number of honors from it and quite active in its alumni

affairs." See Order to Reassign Case, signed by Judge Hill on August 16, 1967, in Appendix hereto, p. A-19.

(5) On July 17, 1969, the petitioners were advised by the Clerk of the Western District that "the Honorable Roy W. Harper, Chief Judge of the United States District Court for the Eastern District of Missouri, now has the above-entitled [Balfour] cases" and that "Judge Harper plans to hold a conference in Kansas City, Missouri in the next week or ten days and expects all counsel to be present." Thereafter ensued certain events leading to the filing of affidavits of bias and prejudice against Judge Harper.

The First Affidavit Respecting Judge Harper

On or about August 21, 1969, the petitioner James A. Murray filed an affidavit of prejudice in his case, No. 737, supported by an appropriate certificate of counsel, pursuant to 28 U.S.C. §144. This affidavit, contained in the certified record before this Court, asserted that the respondent Judge Roy W. Harper had demonstrated personal bias and prejudice "against the antitrust plaintiffs, including myself, and in favor of the antitrust defendants" in the following particulars:

(1) Judge Harper from the start accepted as true a version of the facts and of the law previously expressed by the disqualified Judge Collinson, a version that had been challenged as indicating bias and prejudice on Judge Collinson's part and that in part had led to his disqualification. Paragraphs 13 and 14.

(2) Judge Harper, at the pretrial conference of July 29, 1969, revealed two extrajudicial sources for the biased prejudgments he had already formed when the conference began: (a) a conference or discussion with Judge Collinson concerning the case at a time when both judges

BLEED THROUGH POOR COPY

knew that Judge Collinson was disqualified to act further in the Balfour cases, and (b) a rather voluminous bundle of legal size white sheets containing typewritten material, to which Judge Harper constantly referred while discussing the case with counsel and issuing directives therein. Judge Harper declined to reveal the nature of the latter documents, other than to say they had been prepared for him by "the clerk," and he declined to allow counsel to see or examine the papers. Counsel for petitioners requested that a court reporter be called in to record the conference, in light of the foregoing, but the request was ignored, with the explanation by Judge Harper that he had not expected that anything would happen at the first pre-trial conference. Paragraphs 15 and 16.

Judge Harper, in his Memorandum Opinion and Order of September 8, 1969, held that such an affidavit was inadequate to compel his disqualification under 28 U.S.C. §144 for the following reasons:[4]

(a) The mere fact that an affidavit of prejudice has been filed by the plaintiffs does not, Judge Harper said, automatically require a judge to disqualify himself. The judge must "initially determine the legal sufficiency of the affidavit and the facts that are stated therein." The burden on the affiant was said by Judge Harper to be threefold: (*i*) to state facts with particularity, not conclusions; (*ii*) to state facts so as to convince a

---

[4] Although not permitted by any rule of practice, the counsel for the defendants L. G. Balfour Co., *et al.*, filed a motion to strike the affidavit of prejudice, the motion for change of judge and the certificate of counsel "for the reasons that the pleadings are legally insufficient." Fifteen pages of "suggestions" in support of that motion to strike were also filed. Judge Harper did not purport to grant or otherwise rule on the motion.

reasonable man that bias or prejudice exists; and (*iii*) to state facts showing a personal rather than judicial bias." Purporting to utilize these standards, Judge Harper held the instant affidavit was insufficient.

(b) Treating Case No. 737 (the instant one) as one of the series of thirteen Balfour cases assigned to him, Judge Harper felt that because of the identity of the issues and the fact that Judge Collinson had disqualified himself as to all thirteen cases, the affidavit of the present petitioner (James A. Murray) must be viewed as barred under the language of 28 U.S.C. §144 that "A party may file only one such affidavit in any case." The prior affidavit of John A. Buchroeder, filed in Cases Nos. 683, 684 and 729, which led to Judge Collinson's disqualification in all thirteen cases, was viewed as the one and only affidavit allowable under §144 as to all thirteen of the cases.

(c) Alternatively, "if it be determined that this [Buchroeder affidavit] is only applicable to Cases Nos. 683, 684 and 729," Judge Harper held that the present affidavit of the petitioner Murray was insufficient since (1) the assertions respecting Judge Collinson are not applicable with respect to Judge Harper, (2) the facts and allegations as to the July 29, 1969, conference, which were summarized and not denied, "does not meet requirements necessary for the judge to disqualify in the case." The affidavit was said not to disclose any bias or prejudice personal to the petitioners and not to allege any facts establishing that Judge Harper was personally biased or prejudiced against them.

The Supplemental Affidavit Respecting Judge Harper

Following this denial of the Motion for Change of Judge, the petitioners upon inquiry of Judge Harper for

BLEED THROUGH POOR COPY

the first time learned that he was and is a member of the Delta Theta Phi legal fraternity, one of the named defendants in the Balfour litigation pending before him.[5] As a consequence of acquiring this information, which Judge Harper had not previously revealed, the petitioners filed a motion for rehearing of the denial of the Motion for Change of Judge. Attached to that motion for rehearing was a Supplemental Affidavit of Prejudice setting forth the facts concerning Judge Harper's fraternity affiliation, accompanied by an appropriate certificate of counsel. It was there pointed out that while Delta Theta Phi had not been expressly named in the original complaints in the various Balfour cases, it had been so named in the various amended complaints, including the one which petitioners obtained leave to file. It was further alleged that the interests of Delta Theta Phi were directly and critically involved in this litigation in general and in petitioners' case in particular. See paragraphs 10-12, 16.

---

[5] On September 21, 1969, on instructions from the petitioners, counsel for petitioners made written inquiry of Judge Harper "whether or not Your Honor has ever at any time been a member of or in any way connected with such organization ["social, professional (*e.g.* legal) or honorary fraternity"] or organizations and if so, the name or names of the organizations, if any, with which Your Honor ever at any time had any such connection."

On September 30, 1969, Judge Harper replied: "With respect to your inquiry in your letter of September 21st on behalf of your clients, Mr. and Mrs. Murray, when I was in school I became a member of Delta Theta Phi legal fraternity. Since I have been on the bench I have been made an honorary member of the Order of the Coif. I assume that this is the information you desire."

Supplemental Affidavit of Prejudice, pp. 2-3; see p. A-11, *infra.*

Judge Harper, as indicated in his Order of October 29, 1969, denying the motion for rehearing, did not deny his membership in Delta Theta Phi. Nor did he deny that such fraternity, as a named defendant in the Balfour litigation, had a direct and substantial interest in the outcome of the litigation. Indeed, he did not purport to deny the motion on the theory that an affidavit alleging such a membership and such a direct interest was inadequate in terms of §144. He merely stated that petitioners' counsel had "represented to me that none of the plaintiffs in any of the cases intended to proceed against any of the fraternity or sorority defendants" and "further indicated to me that he would dismiss these defendants from the various cases within a month."[6] See pp. A-11, A-12, *infra.*

Because of the unique and continuing nature of the alleged bias and prejudice exhibited in this litigation by Judge Harper, the petitioner James A. Murray also filed in the Eighth Circuit a Second Supplemental Affidavit of Bias and Prejudice. It is contained in the certified record before this Court. See *In re Union Leader Corporation,* 292 F.2d 381, 388 (1st Cir. 1961); *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.,* 285 F.2d 162, 173 (9th Cir. 1960), respecting the discretionary authority of a Court of Appeals to permit and entertain

---

[6] But he did not reveal in this memorandum opinion that he had pressed counsel to dismiss the fraternity defendants without revealing at that time that he was a member of Delta Theta Phi, which would benefit from such a dismissal. The fraternities had been in the litigation from the start and no previous judicial pressure had been brought to secure such a dismissal.

BLEED THROUGH POOR COPY

a supplemental affidavit of bias filed on the appeal.[7] That affidavit serves to update the prejudicial attitude expressed by the judge and to confirm the petitioners' belief that the judge has a personal bias and prejudice against them and in favor of the defendants Lloyd G. Balfour, *et al.* In summary, this additional affidavit alleges that, subsequent to the filing of the affidavits in the District Court, Judge Harper continued and augmented his prejudice against the petitioners. Citing numerous instances of such prejudice, the affidavit asserts that the judge has systematically and without explanation denied each and every request of the petitioners for relief from obvious grievances and patent violations of recognized pre-trial procedures. Applying a double standard in treating the parties, he has invariably favored the defending parties, and perpetuated and added to the discriminatory nature of prior rulings of disqualified judges.

It should also be noted that the petitioners reached their belief that Judge Harper was personally biased and prejudiced against them within three days of their first exposure to him at the pre-trial conference of July 29, 1969. On August 1, 1969, their counsel wrote Judge Harper suggesting that the admitted consultation with Judge Collinson disqualified Judge Harper and expressing the hope that Judge Harper would voluntarily withdraw

---

[7] Counsel for the defendants L. G. Balfour Co., *et al.*, filed in the Court of Appeals a motion to strike the Second Supplemental Affidavit of Bias and Prejudice, and the accompanying certificate of counsel, on the ground that the affidavit and certificate had never been filed in the District Court nor presented to Judge Harper. The Court of Appeals did not act on this motion and thus presumably entertained the affidavit and certificate in the course of denying the petition for mandamus and/or prohibition.

without the necessity of filing an affidavit of prejudice. Paragraph 19 of the original affidavit of petitioner James A. Murray. That fact, combined with the affidavits that were subsequently filed, demonstrates that at no time since Judge Harper was assigned to this case has he exhibited an attitude calculated to allay the fears and beliefs of the petitioners as to his bias and prejudice.

Finally, certain significant consequences flowing from the alleged bias and prejudice of Judge Harper are obvious from the facts of record recited in the various affidavits on file in this case. To wit:

(1) Judge Harper, by perpetuating certain biased rulings of the disqualified Judge Collinson, has effectively denied petitioners the right to submit to the jury vital evidence bearing on the issue of damages inflicted on petitioners by the defendants' antitrust conduct, as well as Balfour's suppression of such evidence. Judge Collinson, having first given petitioners permission to inquire into the suppression of such crucial evidence by Balfour, revoked that permission and invited a motion to impose sanctions on the petitioners and their counsel for having sought the inquiry in the first place. And Judge Harper has not only approved the ban on any further investigation of this issue but has declared that he will consider imposing the threatened sanctions "somewhere at the appropriate time." But for the bias thus shown against petitioners' legitimate efforts to uncover relevant evidence, the petitioners would be able to submit such evidence to the jury at the trial.

(2) Judge Harper's alleged bias has so operated as to effectively block petitioners' pre-trial discovery and to force them to go to trial without an adequate opportunity to complete such discovery. Thus he has (a) perpetuated a supplemental pre-trial order of a disqualified judge that ignored petitioner's previously established priority of

BLEED THROUGH POOR COPY

discovery and allowed open-ended discovery in total disregard of an expired terminal date set by the original pretrial order and (b) permitted the defendants to engage in prolonged discovery that can terminate only shortly before the trial date, while not allowing discovery by the petitioners during that period, and (c) established an imminent trial date and required a narrative statement of the facts by the petitioners prior to the end of the defendants' prolonged discovery so as to foreclose all further meaningful discovery by petitioners and to force them to trial without a fair opportunity to discover all relevant facts pertinent to their case.[8]

(3) Judge Harper's foregoing actions have imposed so heavy a financial burden on the petitioners in participating in defendants' prolonged discovery hearings, without a full opportunity to develop the relevant facts as to liability and damages, as to render futile and ineffective the private right of action given them by Congress to recover damages for a violation of the antitrust laws. By perpetuating the biased rulings of two prejudiced judges, rulings that may well be void, Judge Harper has added to the crippling of that remedy.

---

[8] Judge Harper ordered the petitioners to file their narrative statement by March 2, 1970, on pain of dismissal of their complaints, a date prior to the completion of discovery by the Balfour defendants. That order was also entered with knowledge that petitioners had not completed their discovery and had sought for over two years to secure an extension of time for that purpose. Judge Harper denied the request for an extension on October 17, 1969, without prejudice to renewing the request after completion of the defendants' discovery – a meaningless right in view of the scheduling of the first trial for April 7, 1970.

The Order of the Eighth Circuit

The petitioners herein, on Thursday afternoon, December 4, 1969, filed in the Eighth Circuit a Petition for a Writ of Mandamus or Prohibition, attaching thereto the relevant affidavits and memorandum opinions and orders of Judge Harper. The application was made pursuant to Rule 21 of the Federal Rules of Appellate Procedure, and was premised on the unquestioned jurisdiction of the Eighth Circuit to entertain such an application seeking to force a federal district judge to disqualify himself before trial once an affidavit of prejudice has been filed pursuant to 28 U.S.C. §144. See *Minnesota & Ontario Paper Co. v. Molyneaux*, 70 F.2d 545 (8th Cir. 1934); *Rosen v. Sugarman*, 357 F.2d 794, 796-797 (2d Cir. 1966); and see *Berger v. United States*, 255 U.S. 22, 36 (1921), stating that "the remedy by appeal is inadequate."

Five days later, on Tuesday, December 9, 1969, the Eighth Circuit filed an order, subscribed to "BY THE COURT," stating that "Upon due consideration of petition for writ of mandamus or prohibition and supporting documents, it is ordered that the petition should be and the same is hereby denied." See Appendix hereto, p. A-1, *infra*. This order was entered *sua sponte*, there having been no answer ordered by the court or submitted by any of the respondents. No briefs were filed, other than the arguments contained in the petition itself, and no oral argument was held. No opinion was rendered. The petition was denied on its merits, there being no jurisdictional problem apparent in the court order.

REASONS FOR GRANTING THE WRIT

Two major factors justify the grant of certiorari in this case: (1) the refusal of the Eighth Circuit to give serious consideration to, or to resolve, the questions raised in the petition for a writ of mandamus and/or

BLEED THROUGH POOR COPY

prohibition; and (2) the intrinsic importance of the questions raised in that petition, and repeated herein, in the context of the fair administration of justice in the federal courts.

I.

The Eighth Circuit has evaded its responsibility to guard against the possibility of bias in the trial of cases within that Circuit.

The action of the Eighth Circuit in summarily denying the petition for writ of mandamus or prohibition filed by the petitioners can only be viewed as an evasion of that tribunal's primary responsibility to guard against the possibility of bias in the trial of cases within that Circuit – particularly a case that is one of the oldest on the dockets of the Circuit wherein two prior judges had been disqualified for bias.

That court concededly had discretionary authority, under Rule 21 of the Federal Rules of Appellate Procedure, to dispose of the petition without calling for a response or permitting full briefing and argument. But that petition raised a variety of challenges to the fairness of a trial judge, challenges that were of a most substantial, important and novel nature. Left unanswered and unresolved, those challenges reflect gravely upon the quality of even-handed justice to which litigants within the Eighth Circuit may be subjected. As this Court has emphasized, the due process requirement of a fair trial in a fair tribunal necessitates not only an absence of bias at trial but steps "to prevent even the probability of unfairness . . . [in order to] 'satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955). Such an endeavor to prevent the appearance of unfairness suggests the need for a more thorough consideration of petitioners' challenges to Judge Harper than that afforded by a summary rejection of the mandamus petition five days after it was filed.

The Eighth Circuit cannot be said to have made a real effort to insure that fairness prevails in trials within its supervisory jurisdiction or that litigants may feel relieved of their fears in that respect. It has declined to perform its high function of testing and resolving the most serious kind of challenge that can be made to a court or a judge. And it has cast upon this Court the burden of reviewing those challenges in the first instance without benefit of the Eighth Circuit's considered views or the refinement of issues that might have ensued from a more thorough treatment of the petition filed below.

But the issues that survive the Eighth Circuit's inaction are of such significance to the federal judiciary and to litigants generally as to warrant review of the order below despite that inaction.

2. A significant and recurring problem is raised as to the meaning and effect of this Court's decision in Berger v. United States, 255 U.S. 22 (1921).

Assuming, as we must, that the Eighth Circuit's summary order reflected satisfaction and agreement with the two memorandum opinions of Judge Harper, a highly important and recurring problem is raised as to the meaning and effect of this Court's decision in *Berger v. United States*, 255 U.S. 22 (1921).

Put simply, the problem that has confused and misled the lower federal courts is a failure to understand that the *Berger* decision means that a judge is automatically disqualified upon the filing of an affidavit of bias and prejudice that meets the formal requirements of 28 U.S.C. §144. That section provides, in essence, that whenever a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice . . . such judge shall proceed

BLEED THROUGH POOR COPY

no further, but another judge shall be assigned to hear such proceeding." The second paragraph of §144 adds that the affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists" and "shall be accompanied by a certificate of counsel of record that it is made in good faith."

Fairly read, the critical holding in *Berger*, 255 U.S. at 33, is that this language of §144

> ". . . permits an affidavit of personal bias or prejudice to be filed, and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and, in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another."

In so ruling, the Court expressly rejected the Government's contention in that case that "the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of judicial judgment upon them" and the further contention that "the action of the affidavit is not 'automatic' . . . but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass." 255 U.S. at 30-31.

In other words, the *Berger* decision determined that the filing of an affidavit in compliance with §144 results in the automatic disqualification of the judge without regard to any judicial assessment of the merits of the allegations of bias in the affidavit. When the Court indicated (255 U.S. at 32) that the trial judge should determine the "legal sufficiency" of the affidavit, as distinguished from "the truth of its statements," the Court

was indicating that the judge could do no more than determine whether the affidavit satisfied the formal terms of the statute – i.e., whether it was timely filed, whether it was accompanied by a certificate of counsel, and whether it stated "the facts and the reasons for the belief that bias or prejudice exists." Implicit in the latter requirement, of course, is that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Berger v. United States, supra,* at 21; *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). But beyond making a determination as to whether the facts or reasons do in fact relate to "something other than rulings," the judge cannot concern himself with the truth, the reality or the sufficiency of the facts or reasons. 255 U.S. at 33.

The Court in *Berger,* moreover, expressly recognized (255 U.S. at 33) the criticism that might be leveled at its ruling "giving an automatism to the affidavit which overrides everything" and depriving the judge of power to assess "the reality and sufficiency of the facts" asserted in the affidavit. Frivolous and false facts or reasons might be asserted and to permit them to serve as an automatic disqualification of the judge, it was urged, would be most undesirable. But such a contention, said the Court, "is a misunderstanding of the requirement" of §144 "that 'the affidavit shall state the facts and reasons for the belief' of the existence of bias and prejudice." 255 U.S. at 33. Without destroying the automatic nature of the disqualification upon the filing of an affidavit in proper form, the precaution against such abuse is to be found in two factors: (1) the certificate of good faith by counsel, with the penalties implicit in an attorney's false swearing; and (2) the penalties attached to perjury by the affiant. Such sanctions, the Court said, were even sufficient to guard against or penalize the failure of the affidavit to present facts and reasons that "give fair support to the charge of a bent

BLEED THROUGH POOR COPY

of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34.

The *Berger* ruling is the only definitive examination of §144 by this Court, and no retreat from or modification of the principles therein enunciated has ever been announced by this tribunal. Rendered in 1921, some ten years after the original enactment of the statute, 36 Stat. 1090 (1911), the *Berger* ruling gives effect to the Congressional purpose that upon the filing of a good faith affidavit the judge is automatically and immediately disqualified and that any assessment of the inadequacies or improprieties of the affidavit is to be made by the successor judge. See 46 Cong. Rec. 2626-2627 (1911).[9]

---

[9] The federal statute was patterned after an Indiana statute that provided for automatic disqualification upon the filing of an affidavit. As stated by the sponsor of the bill that was to become §144 (Rep. Cullop), once an affidavit has been filed, "the judge shall proceed no further" and if the affidavit is to be reviewed "it would be by the judge who is called in to succeed him." 46 Cong. Rec. 2627 (1911). See also Note *Disqualification of Judges Because of Bias and Prejudice*, 51 Yale L. J. 169, 171 (1941).

At least five other states now have statutes providing that a simple allegation of bias by the litigant, without the statement of any supporting facts or circumstances, automatically disqualifies the judge. E.g., Ariz. Rev. Stat. Ann. §12-409 (1956); Cal. Civ. Proc. Code §170.6 (Supp. 1965); Idaho Code Ann. §1-1801 (1948); Nev. Rev. Stat. §1.230(5) (1957); Ore. Rev. Stat. §14.260 (1953). It has been said that this automatic disqualification procedure "goes very far in assuring that each litigant will feel confident that his trial is being impartially conducted." Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1437 (1966).

But the lower federal courts have engrafted a series of conditions upon disqualification that are not to be found in either the language of §144 or the *Berger* ruling. As stated by one commentator, "the clear *Berger* decision, the clear statute, and its clear legislative history have not been followed in practice, and federal trial practice still does not provide a litigant with the automatic change of venue to which he is apparently entitled upon filing an affidavit in good faith." Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629 (1947).

Taking out of context the *Berger* language that "the reasons and facts for the belief the litigant entertains . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," 255 U.S. at 33-34,[10] the lower courts have emasculated the *Berger* ruling and §144 by imposing on the litigant the burden of alleging facts with sufficient particularity so as to convince the accused judge that it

---

[10] This statement from the *Berger* opinion appears in the context of the Court's explanation that the possibility that irresponsible affidavits might be filed – including those that do not set forth reasons and facts that "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" – does not detract from the "absolutism" of the disqualification dictated by the filing of a good faith affidavit in compliance with the formal requirements of §144.

The Court pointed out that the requirement that the affidavit contain a statement of the facts and reasons for the belief as to bias "is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attaching to perjury." This Court gave no indication that the accused judge was authorized to examine into the legal merits or sufficiency of the asserted reasons.

BLEED THROUGH POOR COPY

is fair to conclude that he is personally biased or prejudiced. Time and again these courts have asserted that it is the duty of the accused judge – rather than his successor – "to pass on the sufficiency of the affidavit as a matter of law" and to recuse himself only if the allegations "are sufficient to support the conclusion that the judge has a personal bias or prejudice against the defendant or in favor of the plaintiff." See, *e.g.*, *United States v. Bell*, 351 F.2d 868, 878 (6th Cir. 1965); *Rosen v. Sugarman*, 357 F.2d 794, 797-798 (2nd Cir. 1966); *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2nd Cir. 1968); *Gallarelli v. United States*, 260 F.2d 259, 261 (1st Cir. 1958); *Lyons v. United States*, 325 F.2d 370, 376 (9th Cir. 1963); *In re Union Leader Corporation*, 292 F.2d 381, 389 (1st Cir. 1961); *United States v. Hoffa*, 245 F. Supp. 772 (E.D. Tenn. 1965); *United States v. Hanrahan*, 248 F. Supp. 471, 475 (D.C.D.C. 1965); *Boyance v. United States*, 275 F. Supp. 772 (D.C. Pa. 1967); *Town of East Haven v. Eastern Airlines, Inc.*, 293 F. Supp. 184 (D.C. Conn. 1968).

These post-*Berger* rulings of the lower courts have sought to shift the focus of §144 away from automatic disqualification to a discretionary assessment of the substantiality and merits of the facts and reasons asserted. They have reincarnated many of the arguments rejected by the Court in *Berger* by equating disqualification with the presentation of facts and reasons that are persuasive, *to the judge accused of bias*, that bias actually exists. These decisions have cast upon the accused judge a function that the *Berger* ruling said was not his to pursue, "the delicate and trying duty of deciding upon the question of his own qualification."[11] Yet this refusal by the

---

[11] This quotation was taken by the Court from Judge Meek's opinion in *Henry v. Speer*, 201 Fed. 869 (5th Cir. 1913). The

(Continued)

lower federal courts to apply the plain language of §144 in accordance with the *Berger* reading is completely without legislative sanction. Indeed, when Congress in 1948 revised the Judicial Code and reenacted the provisions of §144, it may be said to have acquiesced in the *Berger* interpretation of those provisions. *United States v. Elgin, J. & E. R. Co.*, 298 U.S. 492 (1936). Certainly, Congress at that point cannot be said to have acquiesced in any contrary lower court interpretations. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947). The *Berger* interpretation must still remain controlling and decisive, a fact that makes the refusal of the lower courts to accept that interpretation a major problem in judicial administration that only this Court can resolve.

The memorandum opinions and actions of Judge Harper in this case, as approved by the Eighth Circuit, constitute a classic example of the judicial erosion by the lower courts of the language of §144 and of the decision in the *Berger* case. His opinion of September 8, 1969, expressly rejected the very essence of that statute and of that decision, *i.e.*, to use his words, "the mere fact that an affidavit of prejudice has been filed does not

---

Footnote 11 (Continued)
Henry case, which was cited by this Court with approval, is instructive as to the extent of the duty of the accused judge in passing on the legal sufficiency of the affidavit. The affidavit in *Henry* had been found insufficient not because of any lack of merit or legal sufficiency in the supporting reasons but because the affidavit failed to charge a "personal" bias as required by §144.

The Court in *Berger*, 255 U.S. at 31, also quoted with approval the statement of the trial judge involved in *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), that the intention of what is now designated as §144 was "to cause a transfer of the case without reference to the merits of the charge of bias" and to do so "immediately."

BLEED THROUGH POOR COPY

automatically require a judge to disqualify himself." See p. A-4, *infra*. Instead, relying upon many of the lower court opinions cited above, Judge Harper announced that he conceived it to be his duty to examine into the "legal sufficiency" of the supporting reasons and facts set forth in the affidavit. And without denying that the affidavit was timely filed in good faith, or that it contained a statement of reasons and facts supporting petitioners' belief as to his bias, he proceeded without further elaboration to find that the affidavit "fails to disclose any bias or prejudice personal to these plaintiffs" and hence "is not legally sufficient." In short, he found that the petitioners had not met a burden he gratuitously imposed on them, a burden of convincing him that the stated facts and reasons "establish that the judge is personally biased or prejudiced against the plaintiffs." See p. A-10, *infra*.

Additionally, Judge Harper borrowed a series of lower court innovations, created without benefit of statutory language or purpose, in placing upon the petitioners a three-fold burden:

(a) A burden of stating facts with particularity, rather than conclusions. But §144 expressly permits the statement not only of "facts" but of "reasons," a word that plainly encompasses "conclusions." And the *Berger* opinion recognized that the beliefs and opinions of the party lie at the very heart of a proper §144 affidavit. 255 U.S. at 34.

(b) A burden of presenting such facts as will "convince a reasonable man that a bias or prejudice exists." But however the *Berger* opinion is read, it certainly imposes no higher burden than presenting facts and reasons that "give fair support" to the charge of a biased bent of mind. 255 U.S. at 33.

(c) A burden of presenting facts that show that the bias is personal, as opposed to judicial in nature. But as this Court noted in *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), by reference to *Berger*, any burden in this respect is merely to show that the alleged bias stemmed from "an extrajudicial source" and resulted in an opinion on the merits "on some basis other than what the judge learned from his participation in the case." Thus, contrary to the ruling below, "personal" bias is that bias acquired from extrajudicial sources, while "judicial" bias is that bias properly acquired by the judge from his assessment of the record. Judge Harper's concept that "personal" bias must relate personally to the petitioners is a perversion of the plain meaning of §144.

The ultimate question posed by Judge Harper's refusal to disqualify himself is whether he is authorized to assess petitioner's affidavits by the foregoing standards or by any other judicial reaction he might have. His memorandum opinions show no more than his own assessment – stated only in the most conclusory terms – that the affidavits fail to establish his bias or prejudice. Without giving these petitioners the slightest assurance that he is in fact impartial (Cf. *Berger*, 255 U. S. at 35-36), Judge Harper has totally ignored the fulcrum of §144 – the bona fide beliefs of the petitioners themselves that he is biased and prejudiced. And he has left unanswered the relevant questions asked by this Court in *Berger* of any judge, particularly one whose connection with a particular case has been brief and who is the target of a disqualification affidavit – "of what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?" 255 U. S. at 35.

Clearly, the action of Judge Harper as approved by the Eighth Circuit affords this Court a long-overdue opportunity to restore to §144 its original and intended

BLEED THROUGH, POOR COPY

meaning. Nearly half a century has elapsed since this Court in *Berger* examined into the language and purpose of §144. Since that time most lower courts have ignored the crux of the *Berger* ruling and converted §144 from an automatic disqualification statute into an invitation to federal district judges to assess the propriety or sufficiency of charges of bias leveled against them. Whether such a conversion is proper is indeed a substantial question.

The problem of judicial disqualification for bias and prejudice is delicate, important and recurring. In the interests proper judicial administration of §144 and in the interests of proper judicial administration of §144 and in the trials by biased judges, the decision below should be reviewed.

III.

Important questions are raised as to the duty of a district judge to disqualify himself for substantial reasons set forth in affidavits of bias and prejudice.

If the *Berger* interpretation of §144 were to be followed, Judge Harper should have automatically disqualified himself upon the filing of the affidavits of bias and prejudice, which met all the formal requirements of §144. But even under the lax standards followed by the post-*Berger* decisions of the lower courts, serious questions are posed by his failure to disqualify himself in light of the unchallenged allegations made against him.

(A) *The failure to disclose fraternity membership.* It is clear, to the point of being virtually the law of this litigation, that membership in a college fraternity that has been named as a defendant in this case constitutes a complete and mandatory disqualification. The interest of

such fraternities in the outcome of the litigation is so direct and substantial, and the membership ties are allegedly so strong, that three other judges at one time connected with this litigation felt compelled to disqualify themselves when the matter was brought to their attention. They have recognized that membership in such a fraternity, like ownership of stock in a corporation that is a party to litigation, is such an interest as to disqualify a member from presiding over the litigation where the fraternity's financial and economic interests are at stake. See *In re Honolulu Consol. Oil Co.*, 243 F. 348 (9th Cir. 1917). Indeed, for a judge who is a member of such a fraternity to preside in such a case as this borders upon a transgression, if it is not an actual violation, of 28 U. U. S. C. §455, which directs a judge to disqualify himself "in any case in which he has a substantial interest."[12]

Judge Harper, who admitted his membership in Delta Theta Phi, a named defendant in the Balfour cases, not only declined to disqualify himself when such matter was formally brought to his attention but knowingly concealed the fact of membership for some time after his assignment to these cases in July of 1969. Not until he was asked in September of 1969 did he reveal his membership, and even then he gave no details as to the extent of his relationship or his association with the fraternity and its officers. He must be presumed to have known that his two immediate predecessors had disqualified themselves

---

[12] Section 455 also directs a judge to disqualify himself if he "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

BLEED THROUGH POOR COPY

for that very reason, among others, and that such membership had been consistently determined to be a disqualification in this prolonged litigation.[13]

A serious question is thus posed, deserving of resolution by this Court, as to the duty of a judge to disqualify himself under §144 when membership is conceded in an organization that is party to the case. The question is one that involves most sensitive and important considerations in the right of litigants to expect the fair and unbiased treatment of their claims.

(B) *The ex parte discussions with a previously disqualified judge.* The assertion in the first affidavit that Judge Harper engaged in *ex parte* conversations about the case with the previously disqualified Judge Collinson, thereby causing Judge Harper to become biased, presents a most serious problem in the fair administration of justice in the federal courts.[14] Judge Harper neither denied nor explained these conversations; no explanation was offered as to the scope or content of these conversations and there was no indication as to who else might have been present. Judge Harper dismissed these assertions by arguing that anything in the affidavit dealing with Judge

---

13 Judge Harper's only attempt to rationalize his fraternity membership was by reference to the alleged commitment of petitioners' counsel not to proceed against the fraternities and to drop them as defendants. But whether or not such a representation or commitment was made, the interest of the fraternity in either staying in the case or being freed from the hazards of litigation remained the same. Judge Harper further overlooked the allegation that he pressed for such a commitment from counsel without revealing his interest and membership. And in any event, such a possible commitment was irrelevant to petitioners' own belief that Judge Harper's membership indicated a biased bent of mind – the critical factor under §144.

14 The record shows that Judge Collinson, prior to his disqualification, had assertedly sought to bring undue influence to bear on a

(Continued)

Collinson was not applicable to judging his own disqualification. But such an argument cannot hide the issue that warrants this Court's attention.

Where there has been a history of biased judges, necessitating their disqualification under §144, a substitute judge would appear to be under a particularly strong duty to avoid any *ex parte* contact with any of his disqualified predecessors in connection with the case. It has been said that "the judge who substitutes for a disqualified colleague [should] . . . be particularly ready to disqualify himself if there is any chance that he may not be entirely impartial." Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1434, 1445 (1966). And in order to avoid that chance or even the appearance of partiality, the successor judge should avoid any *ex parte* contact with his biased predecessors that might cause the litigants to suspect that he has absorbed some of the presumed bias and prejudice of the disqualified colleague.

The lack of any authoritative guidance to judges confronted with such a situation involving previously

---

Footnote 14 (Continued)
federal judge in a related proceeding in Massachusetts in a manner contrary to the interests of the plaintiffs in the Balfour cases and for the benefit of the Balfour defendants. That assertion was fully set forth in Exhibit A attached to petitioner Murray's affidavit of prejudice, dated August 21, 1969. Exhibit A thus has relevance in explaining the reasons substantiating petitioners' belief that Judge Harper's *ex parte* conversations with Judge Collinson might have affected Judge Harper's impartiality.

Petitioners' fears in this connection were confirmed in their minds upon the entry of Judge Harper's order of August 4, 1969, making a significant and prejudicial change in the pretrial order which no one had suggested to Judge Harper but which had been earlier suggested by Balfour to Judge Collinson. See Second Supplemental Affidavit of Bias and Prejudice, paragraph 7.

BLEED THROUGH POOR COPY

disqualified colleagues bespeaks a need for consideration and resolution of the problem by this Court. That problem may appropriately be dealt with in the context of a §144 claim of bias and prejudice, for it is as much in the interest of the litigants to know what to expect of presiding judges in this situation as it is in the interest of the judges themselves to be advised of the standard of fair conduct which they must follow.

(C) *The resort to sources outside the record.* As fully documented in the first affidavit and as conceded by Judge Harper in his memorandum opinion (p. A-9, *infra*), Judge Harper utilized extrajudicial materials in formulating many of his allegedly biased judgments and rulings in the pretrial proceedings. Not only did he consult Judge Collinson outside the record, but he used an extensive extrajudicial document – purportedly prepared by the clerk as "a synopsis or abstract of the pleadings and record" but never introduced into the record or shown to the petitioners or their counsel.

This Court has repeatedly and consistently condemned the use of extrajudicial matters that deprives a litigant of the right to be confronted with and to cross-examine the evidence against him. See, *e.g.*, *Green v. McElroy*, 360 U. S. 474, 496-497 (1959). No less is such practice to be condemned when it appears in the context of biased rulings and determinations. Indeed, it is precisely the use of such extrajudicial material that constitutes the "personal" aspect of the bias and prejudice concept of §144. See *United States v. Grinnell Corp.*, 384 U. S. 563, 583 (1966); *Craven v. United States*, 22 F.2d 605, 607-608 (1st Cir. 1927). And while it may often be difficult to establish the extrajudicial source of bias and prejudice, *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2nd Cir. 1968), the instant case presents no such problem. The extrajudicial source of the alleged bias is conceded.

There remains the need for this Court to announce in no uncertain terms that federal judges may not predicate their rulings upon documents not introduced into the record and that the filing of an affidavit alleging that biased rulings were predicated upon such extrajudicial sources is sufficient to compel the offending judge to disqualify himself under §144.

(D) *The pattern of unfair conduct, lack of candor and reliance on rulings of biased and disqualified judges.* The documented allegations in this case that Judge Harper has exhibited a pattern of conduct that is not only biased but amounts to a denial of due process are virtually unparalleled in federal judicial history. He has, according to the undenied allegations, (1) neglected to reveal his membership in a fraternity named as a party defendant, until forced by the petitioners to admit his membership, (2) refused to reveal the content or source of documents from which he made allegedly biased rulings, (3) consulted off the record with a previously disqualified judge, (4) renewed and perpetuated prior orders entered by disqualified and biased judges without regard to petitioners' claims that such orders were unfair and improper, (5) established a pretrial pattern that gives every advantage to the opposing Balfour defendants and, by a discriminatory application of the priority rule, has made it impossible for petitioners to complete their discovery prior to trial, (6) established a date for the filing of petitioners' narrative statement without regard to and before any possible completion of discovery, (7) ignored petitioners' request that a reporter be present at the pretrial conference of July 29, 1969, when important rulings and directives were made,[15] and (8) purportedly dismissed all objections to

---

[15] Congress has required that a reporter be present at all court proceedings "as may be requested by any party to the proceeding." 28 U. S. C. §753(b). Judge Harper's stated reason for not acceding (Continued)

BLEED THROUGH POOR COPY

matters occurring before July 29, 1969, while discriminatorily retaining the threat of the defendants' antecedent motion to have the petitioners or their counsel penalized in connection with their efforts prior to that date to uncover evidence allegedly concealed by the defendants.

Such allegations, documented thoroughly as to facts, cannot be dismissed as frivolous. Nor can they be said to lack the substantiality or legal sufficiency that the lower courts have indicated is necessary to compel a judge to disqualify himself under §144. On the contrary, the substantiality and the sufficiency revealed by this pattern of conduct are overwhelming in nature, to the point where the very reputation of the federal judiciary is at stake in terms of its ability and willingness to protect litigants against such actual and seeming unfairness. That fact alone justifies and indeed demands review of this proceeding by this Court.

And among the plethora of issues that arise out of this long pattern of discriminatory and biased judicial actions is one not previously discussed that is particularly relevant to the appropriateness of certiorari. Judge Harper's constant reliance on and perpetuation of previous orders entered by disqualified judges, orders that themselves are allegedly discriminatory, raise a most serious problem deserving of this Court's consideration. Should any allegedly discriminatory order entered by a disqualified judge be considered void?[16] Is a successor judge free to ignore any objections to such an order and to rely on and perpetuate that order? Can any proceeding that is impregnated with

---

Footnote 15 (Continued)
to the request was that he had not expected that anything would happen at the conference. Paragraph 13 of petitioner Murray's original affidavit of bias. But the actions there taken belie the candor of that explanation.

16 The general rule is "that if a judge is disqualified he shall not sit; and that a court in which he with other judges participates is not properly constituted, and its judgments ought not to stand." 1 Freeman, *Judgments* 657 (5th ed. 1925).

such orders be considered fair? Must not the successor judge make a *de novo* examination of the record and issue *de novo* rulings freed from any possible contamination by the prior orders?

The substantiality of those questions is augmented by the ruling of this Court in *McClaughry v. Deming*, 185 U. S. 49 (1902), holding invalid an order issued by a court-martial composed of officers incompetent to sit thereon. In the course of that opinion, 185 U. S. at 67-68, the Court quoted with approval from an early New York decision (*Oakley v. Aspinwall*, 3 N. Y. 547) that ruled void a judgment rendered by a judge disqualified to sit "by reason of consanguinity to one of the parties." The reason why such a judgment must be voided, said the New York court, was that

> "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness."

And this Court added its own observation that "A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction." 185 U. S. at 68.

The Sixth Circuit's ruling in *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (1966), further illustrates this basic notion that the participation of a disqualified judge or administrator in a judicial-type proceeding amounts "to a denial of due process which invalidated

BLEED THROUGH, POOR COPY

the order under review." There a commissioner was found disqualified, necessitating a new hearing, due to his prior actions as a congressional committee counsel investigating the same facts, issues and parties involved in the agency proceedings. And here the application of the *American Cyanamid* doctrine would mean the voiding of all pretrial orders and directions entered by judges who have disqualified themselves on charges of bias and prejudice.

It is of obvious importance that this Court now determine the applicability of this voidness doctrine to orders entered by disqualified judges, orders which in themselves are the targets of charges of unfairness and bias.

IV.

An important problem is presented as to the number of affidavits of bias allowable under §144 in multiparty litigation.

While Judge Harper's Memorandum Opinion of September 8, 1969, puts the matter in the alternative, the first and perhaps the primary point made in that opinion is that the original affidavit filed herein by the petitioner James A. Murray was barred by provision of §144 that "A party may file only one such affidavit in any case."[17] This conclusion was reached by viewing all the thirteen Balfour cases as an interrelated unit, indistinguishable as to the issues involved, and by treating the Buchroeder affidavit (filed only in Cases Nos. 683, 684 and 729) as the one affidavit allowable as to any one party under §144.

---

[17] Judge Harper did not invoke this provision of §144 with reference to the petitioners' second affidavit, accompanying the motion for rehearing, which dealt with Judge Harper's fraternity membership. That second affidavit was found insufficient for reasons not entirely clear.

Such a ruling ignores both the reality of this litigation and the plain meaning of §144. All the Balfour cases are related with respect to the basic antitrust issues involved. But that identity springs primarily from the identity of the Balfour defendants in the various cases and the acts they allegedly engaged in. The plaintiffs, however, have filed separate and distinct suits; as to each of them the relief and the damages sought are different and some of their other problems of proof may well be distinctive. And the fact that Judge Collinson saw fit to disqualify himself in all these related cases, although the Buchroeder affidavit was filed in only three of them, cannot destroy the separateness of the parties plaintiff.

Moreover, the Buchroeder affidavit claimed only that the plaintiff Buchroeder had reason to believe that Judge Collinson was biased and prejudiced. Nothing was claimed therein as to the beliefs in this respect as to Judge Harper, who was not then involved in the case, or as to the plaintiffs in the other related but separate cases. Cf. *United States v. Hoffa*, 382 F.2d 856, 861 (6th Cir. 1967).

Section 144 provides quite simply that "A party may file only one such affidavit in any case." No proscription is made against the filing of an affidavit by a party different from the one who filed an earlier affidavit. The proscription runs only against the identical party filing two or more affidavits; and that is all that *Martin v. Texas Indemnity Insurance Company*, 214 F. Supp. 477 (N. D. Tex. 1962), cited by Judge Harper, can be said to hold. Since Buchroeder is and was a party different and distinct from the petitioner Murray, the latter cannot be considered barred under §144 from filing his own affidavit as to his own beliefs as to the bias exhibited toward him by an entirely different judge.

BLEED THROUGH POOR COPY

To hold that a party is barred under these circumstances from filing an affidavit under §144, or even from filing supplemental affidavits alleging new facts sustaining the belief that a judge is biased, is to raise critical problems of constitutional due process. The right to a fair trial is so much of the essence of due process, *In re Murchison*, 349 U. S. 133, 136 (1955), that forcing an individual party to go to trial before a judge who is or may be prejudiced against him must be considered violative of the constitutional guarantee, particularly where, as here, the judge's association with one of the parties in the case may reflect a substantial interest in reaching a conclusion against the litigant in his case. See *Tumey v. Ohio*, 273 U. S. 510, 523 (1927).

Avoidance of those constitutional involvements can be achieved only by giving §144 the plain reading that its plain language demands, thereby giving the petitioner Murray the right to file his affidavit without regard to the prior Buchroeder affidavit. This problem in statutory interpretation is both important and likely to be of a recurring nature as multiparty litigation increases in the federal courts. For that reason, certiorari should be granted.

CONCLUSION

The situation revealed by this petition is a most aggravated one. Seldom if ever in American judicial history has any litigation been beset with a pattern of bias and prejudice on so continuing a basis. Not since the retirement of Judge Duncan more than four years ago have the Balfour cases been administered by a judge free of bias and prejudice. The petitioners have thus been denied their right to a fair tribunal for over four years. To repeat the words of the Sixth Circuit in *American Cyanamid Company v. F. T. C.*, 363 F.2d 757, 767: "It is fundamental that both unfairness and the appearance of unfairness

should be avoided. Wherever there may be reasonable suspicion, it is best to disqualify." That is the practice that this Court should direct in this case.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NICK C. SPANOS
6404 Wilshire Boulevard
Los Angeles, California 90048

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20,048

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Petitioners,

v.

THE HONORABLE ROY W. HARPER, Judge of the United States District Court and of the Eastern and Western Districts of Missouri,

Respondent.

ORDER

Upon due consideration of petition for writ of mandamus or prohibition and supporting documents, it is ordered that the petition should be and the same is hereby denied.

BY THE COURT

Dated this 9th day of December, 1969.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Filed September 8, 1969]

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Plaintiffs,

v.

LLOYD G. BALFOUR, *et al.*,

Defendants.

No. 737

MEMORANDUM OPINION AND ORDER

This matter is presently pending before this court on a motion to disqualify the judge.

28 USCA 144 provides the specific means whereby the plaintiffs may assert the alleged personal bias or prejudice of a judge as a cause for his recuse. This section reads:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either *against him* or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> "The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

It is perfectly obvious that the existence of a completely fair and impartial tribunal is the most basic requirement of due process. Without that, our judicial system would be a farce. As stated, "[D]emocracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness." *In re J. P. Linahan*, 138 F.2d 650, 651 (2nd Cir. 1943). See, *e.g.*, *In re Murchinson*, 349 U.S. 133 (1955). But the impartiality required is not a strict neutrality. It is, of course, impossible for our judges to come into their court rooms devoid of their own personal experiences, beliefs and backgrounds. *In re Linahan, supra*; *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 898 (D. C. Ala. 1912); *In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961). "For example, prior judicial views will not disqualify." *In re Union Leader Corp., supra*, at 388; *Denis v. Perfect Parts, Inc.*, 142 F. Supp. 259 (D. C. D. Mass. 1956).

As noted, "[T]he statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 U.S. 42) against wrongdoers, civil or criminal, acquired from

evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." *Craven v. United States*, 22 F.2d 605, 608 (1st Cir. 1927). Thus, what the statute is designed to remedy is the situation in which the judge in question is alleged to have a bias or prejudice against these plaintiffs of such a nature that it would prevent that judge from presiding in a fair and impartial manner. It would seem that in a trial before a jury, such allegations must be particularly serious to warrant a judge withdrawing.

It has been repeatedly stated by many authorities that the judge involved has a duty to remain as judge in a particular instance and that this duty is equally as strong in his duty under this statute to recuse himself. *In re Union Leader Corp., supra*, at 391; *Simmons v. United States*, 302 F.2d 71 (3rd Cir. 1962); *In re Federal Facilities Realty Trust Co.*, 140 F. Supp. 522, 524 (N. D. Ill. 1956).

Clearly, the mere fact that an affidavit of prejudice has been filed by the plaintiffs does not automatically require a judge to disqualify himself. *United States v. Hanrahan*, 248 F. Supp. 471, 475 (D.C. D.C. 1965); *United States v. Gilboy*, 162 F. Supp. 384, 388 (M.D. Pa. 1958). The judge attacked by the affidavit must, however, initially determine the legal sufficiency of the affidavit and the facts that are stated therein. See, *e.g., United States v. Hanrahan, supra; Green v. Murphy*, 259 F.2d 591, 593 (2nd Cir. 1958). In essence, it must be said that the statute here provides the plaintiffs with the means whereby they can insure that their trial is free from any personal bias or prejudice, subject only to their ability to allege facts to support

BLEED THROUGH POOR COPY

their claim and their attorney's duty to certify good faith in the filing of the affidavit. *Mitchell v. United States,* 126 F.2d 550, 552 (10th Cir.), cert. denied, 316 U.S. 702 (1942). The plaintiffs and their attorney's sense of ethics are the sole limits provided by this section. The court is precluded from refuting the facts alleged regardless of their nature. It cannot pass on their truth, but rather must accept them as fact. Hence, review is limited to sufficiency and compliance with the statute. *Berger v. United States,* 255 U.S. 22 (1921); *Ex parte American Steel Barrel Co.,* 230 U.S. 35 (1913); *Korer v. Hoffman,* 212 F.2d 211 (7th Cir. 1954); *United States v. Parker,* 23 F. Supp. 880 (D. N.J. 1938), aff'd, 103 F.2d 857; *Johnson v. United States,* 35 F.2d 355, 357 (D. C. Wash 1929).

At the outset of the inquiry the judge is presumed to be qualified to hear the case, and there is a substantial burden upon the plaintiffs to demonstrate that such is not the case. *In re Union Leader Corp., supra,* at 389. As stated in *In re American Steel Barrel Co., supra,* at 43: "[T]he basis of disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his function in a particular case."

The burden upon the affiant to provide this basis is threefold. First, the affidavit must state *facts* with sufficient particularity. Only the facts contained therein are relevant, not conclusions. *Inland Freight Lines v. United States,* 202 F.2d 169 (10th Cir. 1953). Second, the facts must be such as to convince a reasonable man that a bias or prejudice exists. *United States v. Hoffa,* 245 F. Supp. 772 (E. D. Tenn. 1965); *Berger v. United States, supra,* at 33-34. Third, "[I]n addition to establishing that a prejudice or bias harbored by a judge is of such a nature that it has, or may have, closed his

mind to justice, the factual allegations must also show that this bias is *personal*, as opposed to *judicial* in nature." *United States v. Hanrahan, supra,* at 476; *Gallarellie v. United States,* 260 F.2d 259 (1st Cir. 1958); *United States v. Gilboy, supra,* at 394. (In ascertaining whether or not this burden has been met by the affiant, the law clearly has developed so that the statutory requirements are to be strictly followed. *Scott v. Beams,* 122 F.2d 777, 778 (10th Cir. 1941). That the bias demonstrated must be personal is of the greatest significance. *Craven v. United States, supra,* at 607; *In re Union Leader Corp., supra,* at 388. The bias or prejudice complained of must relate to these individuals as such. See *United States v. Hanrahan, supra, In re Federal Facilities Realty Trust Co., supra,* at 526. Judicial "bias" is not sufficient. It would be less than natural if certain attitudes were not developed over the years one spends on the bench. It would indeed be strange if "a judge became less qualified the greater his judicial experience."

Having outlined in a general way the applicable law, a view at the motion is appropriate. The circumstances presented are these:

This case is one of a series of thirteen (the other twelve being Nos. 683, 684, 729, 736, 751, 752, 753, 754, 755, 792, 1193 and 1194), which were recently assigned to this United States District Judge. The characterization of these cases is well set out in a memorandum filed by the plaintiffs' attorneys in their case in support of the motion to stay all proceedings filed in the other twelve cases on September 2, 1969. There were two such memoranda. They are in part almost identical, and I shall quote from the one filed in Cases Nos. 683 and 684, as follows: "Because of

the identify of the issues in all of the said cases, although there is no identity of parties, all of the said cases have for many years been treated and handled as a single group or unit and rulings made in one case have generally been applicable to all of the cases in the group. The issues raised by the 'Motion to Change Judge' in Case No. 737 are common to all of the cases in the group, including the above identified cases, and the disposition of the 'Motion to Change Judge' in Cause No. 737 would be dispositive of the identical issue which exists in each of the two above identified cases as well."

A similar sentence to the second sentence quoted above is found in the memorandum in support of the Motion to Stay all Proceedings filed in the other ten cases. Each of these memoranda were submitted on behalf of the plaintiffs in ten antitrust cases and on behalf of the defendant in its antitrust counterclaims in the first two cases.

There were several pre-trial orders previously entered in these thirteen cases, the first of which was filed on May 19, 1967, and paragraph 1 of that order says in part as follows: "All of the above-captioned actions may be referred to as the 'Fraternity-Buchroeder-Balfour cases', which description shall be understood to embrace all of said cases. All motions, pleadings, orders or other filings * * * shall be deemed to apply equally to each of the * * * actions as though individually filed therein." This has been carried out in subsequent pre-trial orders made in the case.

The plaintiffs in this case support their motion by an affidavit of prejudice directed against this judge, and attach thereto a 62-page affidavit directed against Judge Collinson, the judge who prior to this judge

presided in this matter until his disqualification. Additionally, the motion is supported by certificate of counsel and generally speaking adopts the suggestions used in a similar motion filed against Judge Collinson in Cases Nos. 683, 684 and 729, which brought about Judge Collinson's disqualification in those three cases and in the other cases as well. 28 USCA 144, quoted, *supra*, states in part: "A party may file only one such affidavit in any case."

In *Martin v. Texas Indemnity Ins. Co.*, 214 F. Supp. 477, cert. denied, 377 U.S. 971, a motion filed to disqualify the second judge in the case was denied. While the prior motion disqualifying Judge Collinson was filed only in Cases Nos. 683, 684 and 729, it led to his disqualification in all of the cases, as the cases have been treated as a single group or unit, and as set out in the memoranda in support of the two motions to stay all proceedings, a ruling by this judge on the Motion to Change Judge in Case No. 737 would be dispositive of the identical issue which exists in each of the identified cases as well.

Accepting and agreeing with this statement as properly describing the situation, in view of the statute itself and the ruling in the *Martin* case, *supra*, the motion must be denied.

If, however, it be determined that this is only applicable to Cases Nos. 683, 684 and 729, in which the prior affidavit was filed against Judge Collinson leading to his disqualification in those cases, it would be necessary to turn to the affidavit filed in this case to determine its sufficiency. Exhibit A attached to the affidavit, being the affidavit which the affiant states he intended to file against Judge Collinson had he not disqualified in the case, is of no significance in this case because it deals entirely with Judge Collinson and is not applicable with respect to this judge.

BLEED THROUGH POOR COPY

Turning to the affidavit filed by James A. Murray with respect to this judge, we find that it is fifteen pages in length, exclusive of Exhibit A, and contains some nineteen numbered paragraphs. Other than the allegation that this judge has a personal bias and prejudice and is unable to exercise his judicial functions impartially and fairly, the first twelve paragraphs deal with matters which occurred in these cases prior to this judge's entry into them, and the language just referred to is a conclusion, not a fact nor a reason, and legally insufficient to comply with the requirements of this statute to disqualify a judge.

Paragraphs 12 through 18 of the affidavit deal with this judge. They refer to a conference which occurred on July 29, 1969. When the cases were assigned to this judge he went to Kansas City on July 28th and spent the entire day in familiarizing himself with the files in these cases prior to the conference referred to. Paragraphs 12 through 18 dealing with the conference with respect to this judge set out that he expressed views as to facts of issues and law which were the same as made by prior judges in the case. After the conference had started it was requested that a court reporter be present because of the fact that this judge stated that he had conferred previously with Judge Collinson, the prior judge in the case, and the fact that this judge referred to a synopsis or abstract of the pleadings and records in the Balfour case and later refused the request of plaintiffs' counsel to supply them with a copy.

An examination of paragraphs 12 through 18 does not meet requirements necessary for the judge to disqualify in the case. As set out, *supra*, the affidavit must state facts, not conclusions, and must be such as to convince a reasonable man that a bias or prejudice exists which is of such a nature that it has or may have closed the judge's mind to justice. The

factual allegations must show that this bias is personal as opposed to judicial in nature. The affidavit of James A. Murray does not meet these requirements.

While this judge cannot go beyond the affidavit itself, for the affidavit to be proper it must set out statements made by the judge and action taken by the judge which discloses his prejudice, which the affidavit does not do. The affidavit itself fails to disclose any bias or prejudice personal to these plaintiffs. It is not legally sufficient, for to be so it must state facts which establish that the judge is personally biased or prejudiced against the plaintiffs. *Berger v. United States, supra.*

It is well settled that an affidavit must give "fair support to the charge of a bent mind that may prevent or impede impartiality," *Berger v. United States, supra,* and that it must be "sufficient to fairly convince a sane and reasonable mind that such attitudes on the part of the attacked judge do exist." *United States v. Hoffa, supra.*

"It is the trial judge's duty to prevent a [party] from utilizing an affidavit of prejudice for the sole purpose of delaying and otherwise unjustifiably embarrassing the administration of justice." *United States v. Birrell,* 276 F. Supp. 798. There is a presumption that the judge is qualified and, therefore, there is a substantial burden upon the plaintiffs to make a showing to the contrary, and there is as much of an obligation upon the judge not to recuse himself in situations where there is no occasion for him to do so as there is for him to recuse himself where the allegations in the affidavit are sufficient. *In re Union Leader Corporation,* 292 F.2d 381, cert. denied, 368 U.S. 927.

For the reasons heretofore outlined the plaintiffs' motion will be denied.

/s/ Roy W. Harper
U. S. District Judge

[Filed October 29, 1969]

ORDER

This matter is presently pending before this Court on a motion for rehearing for motion for change of judge which was filed on October 14, 1969. Attached to the motion is a supplemental affidavit of prejudice sworn to by James A. Murray and certificate of good faith executed by Mr. Murray's attorneys.

The principal basis for the supplemental affidavit has to do with this judge's affiliation with Delta Theta Phi law fraternity.

The petition filed in this matter included the L. G. Balfour Company and multiple defendants. The multiple defendants included among others a number of fraternities and sororities. The records disclose that no efforts have been made at any time to secure service on other than the L. G. Balfour Company, either in this case or the companion case.

The files in these cases would indicate that Mr. Murray's attorneys have represented to the other judges in these cases that none of the plaintiffs in these cases intended to proceed against any of the fraternity or sorority defendants or any of the other defendants except

the Balfour Company. An example of such representation is paragraph (f), page 17, of plaintiffs' reply to supplemental suggestions of defendant, L. G. Balfour Company, in opposition to plaintiffs' motion for leave to file amended and supplemental complaints filed November 13, 1968. Reference is made to this particular paragraph because the amended and supplemental complaints included a number of fraternities and sororities as well as other defendants other than the Balfour Company. In the original suit filed in this case the Delta Theta Phi was not a named plaintiff, but in the purported amended complaints, where some substitutions were made from the original complaint, it is alleged as a party plaintiff, but after it was lodged with the court the plaintiffs' attorney, as set up above, indicated that they did not intend to proceed against any of the fraternity or sororities defendants.

Further, at the first conference held by this judge with the attorneys in late July of 1969, Mr. Spanos, attorney for the plaintiffs in this and the companion cases, represented to me that none of the plaintiffs in any of the cases intended to proceed against any of the fraternity or sorority defendants, and Mr. Spanos further indicated to me that he would dismiss these defendants from the various cases within a month.

An examination of the affidavit filed with respect to the motion before the court speaks clearly as to what has occurred when we consider it in connection with the other motions which have been filed with respect to the matter.

Plaintiffs' motion for rehearing for motion for change of judge is denied in all respects.

/s/ Roy W. Harper
U. S. District Judge

BLEED THROUGH POOR COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

[Filed July 3, 1969]

J. A. BUCHROEDER & COMPANY, *Plaintiff,* v. L. G. BALFOUR COMPANY, *et al.*, *Defendants.* and RELATED CASES	Nos.	683 753 684 754 729 755 736 792 737 1193 751 1194 752

ORDER

J. A. Buchroeder & Company, by its president and chief stockholder, has filed a motion for change of judge in cases Nos. 683, 684 and 729, in which it is a party. The motion is accompanied by an "Affidavit of Prejudice" executed by the president, and a certificate as to good faith signed by the present attorneys for the Company.

This motion is filed under Section 144, Title 28 U.S.C. Under the rule established by the Supreme Court in the case of *Berger v. U. S.*, 255 U.S. 22, the factual allegations of the affidavit may not be questioned, but must be taken as true for the purpose of the motion, and the only matter for decision by the Court is whether the facts as alleged give fair support to the charge of bias and prejudice, and whether the motion is timely filed. Although this Court has grave doubts on both points, the Court has determined to resolve these doubts in favor of the moving party. This Court feels that the prime consideration is public

confidence in impartiality of the judiciary, and the present system, whereby the judge whose impartiality is questioned passes on the adequacy of the affidavit, places that judge in an embarrassing and peculiar position.

When the Honorable John W. Oliver's impartiality was questioned by the same counsel, he promptly disqualified and transferred these cases to this division; and this is the natural reaction of any judge under the same circumstances. Just why this affidavit had to contain several pages of disparaging remarks about Judge Oliver is not clear to this Court.

Many of the cases and text writers which discuss disqualification of judges stress the belief that in this situation the "appearance" of impartiality is of the utmost importance, rather than the true test of whether there is actual bias and prejudice. This appears to be the reason for the extremely galling rule that the truth of the allegations cannot be inquired into or disputed in any way. The reading of this affidavit from a judicial viewpoint, with the knowledge that I had to accept these allegations as true and pass on their legal sufficiency, has been my most unpleasant experience in twenty years on the trial bench. However, I certainly would not want to preside at a trial at which counsel for one of the parties felt about the Court as, obviously, counsel for the movant must.

For the above reasons, it is hereby

ORDERED that the motion for change of judge in cases Nos. 683, 684 and 729 be, and is hereby, sustained, and further

ORDERED that because of the related nature of all the above listed cases and the common discovery, which has already been had, this Court hereby disqualifies in

BLEED THROUGH POOR COPY

the remaining cases listed above upon its own motion, and ORDERED that all the cases may be assigned to another judge.

Since the Honorable Elmo B. Hunter is the only active judge of this court who is not disqualified in these cases, it will be necessary for him to make any future orders which are necessary.

/s/ William R. Collinson
District Judge

[Filed April 1, 1968]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PHI DELTA THETA FRATERNITY, *Plaintiff,*	:	
v.	:	No. 683
J. A. BUCHROEDER & COMPANY, *Defendant.*	:	

MEMORANDUM AND ORDER OF TRANSFER

The files and records in this case show that after we entered our order of March 12, 1968 complications have developed concerning the manner in which defendant and counter-claimant Buchroeder's motion for production filed February 26, 1968 should be processed.

The record reflects that when the group of cases of which this case is one was transferred to this Division of this Court, all parties were advised that the Judge of this Division had joined Phi Delta Theta Fraternity when a student some thirty years ago at the University of Missouri. All parties, by their then counsel, then expressly waived any right to raise any question concerning any possible disqualification of the Judge of this Division, pursuant to Section 455 of Title 28, United States Code, or otherwise.

Since that waiver was made at the outset of the handling of the associated cases by the Judge of this Division, there have been a number of changes in counsel who have been and are now actively engaged in the preparation of these cases for trial. At least some of the new counsel were unfamiliar with the fact of the initial waiver.

Apart, however, from any question of whether there has been any change of circumstance since the original waiver was made, it is my judgment that, regardless of how I might rule the pending motion, and regardless of how I might direct further proceedings in this and other associated cases, there exists a real possibility that at least some of the parties might entertain some doubt, reasonably or unreasonably, of my total lack of interest in regard to the group of cases that pend before me. I have therefore determined to take what I deem to be appropriate action before receiving further advice from any of the parties or their counsel.

In *Public Utilities Comm'r. v. Pollak*, 343 U.S. 451 at 467 (1952), Mr. Justice Frankfurter noted that Judges refuse to continue to sit in particular cases for a variety of reasons. He stated that it was his "view that it is desirable to state why [a judge] takes himself out of a case." I share that view.

I also agree with Mr. Justice Frankfurter's suggestion that "the guiding consideration" that controls when a judge recuses himself "is that the administration of justice should appear to be disinterested, as well as be so in fact."

It is my judgment that the manner in which the question of my college membership in Phi Delta Theta has been recently injected could be said to not unfairly lead persons unacquainted with the actual facts concerning my total lack of interest to believe that some sort of unconscious feeling might operate on the ultimate judgments that I will be required to make in the further preparation and trial of this group of cases.

Under these circumstances, I am convinced that the pending motion to produce and all other proceedings should be ruled and directed by another Judge of this Court. I have consulted with the Honorable William R. Collinson, Judge of Division No. Two, and he is agreeable to accept the transfer all of the cases.

For the reasons stated, the following cases now pending in this Division should be and hereby are transferred to the Honorable William R. Collinson, Judge of Division Two of this Court, for all further proceedings:

683 *Phi Delta Theta Fraternity v. J. A. Buchroeder & Company*

684 *Sigma Chi Corp. and Sigma Chi Fraternity v. J. A. Buchroeder & Company*

729 *J. A. Buchroeder & Co. v. Lloyd G. Balfour, et al.*

736 *Columbus Stationery Co. v. Lloyd G. Balfour, et al.*

737 *James A. and Edith B. Murray v. Lloyd G. Balfour, et al.*

751 *Edward F. Miller v. Lloyd G. Balfour, et al.*

752 *H. F. Michaelis v. Lloyd G. Balfour, et al.*

753 *William G. Underwood v. Lloyd G. Balfour, et al.*

754 *James L. Lester, Jr. v. Lloyd G. Balfour, et al.*

755 *H. E. Pennington v. Lloyd G. Balfour, et al.*

792 *H. O. Farris v. Lloyd G. Balfour, et al.*

1193 *Joseph Franke, d/b/a Campus Jewelers v. Lloyd G. Balfour, et al.*

1194 *Jack Grace, d/b/a Grace Sales Co. v. Lloyd G. Balfour, et al.*

Further, it is

ORDERED that a copy of this order shall be filed in each of the listed cases and that such filing shall be considered as our order of transfer in that particular case to Division Two of this Court.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
April 1, 1968

The above order was considered by the Court *en banc*, Chief Judge Becker not participating for the reason that he was counsel for some of the parties before his appointment as a United States District Judge. This order is entered by Judge Oliver with the approval of the Court *en banc*, Chief Judge Becker not participating for the reason stated.

/s/ William R. Collinson
District Judge

/s/ Elmo B. Hunter
District Judge

BLEED THROUGH POOR COPY

[Filed August 16, 1967]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J. A. MEYERS & COMPANY, INC., a corporation,	:	
Plaintiff,	:	
v.	:	
LLOYD G. BALFOUR, an individual; L. G. BALFOUR COMPANY, a corporation, *et al.,*	:	**No. 67-1118-IH**
Defendants.	:	

ORDER TO REASSIGN CASE

The undersigned Judge, to whom the above-entitled and numbered cause was assigned pursuant to Local Rule 2, feeling that he should not sit on the trial, by reason of one of plaintiff's counsel was an associate in my law office for a considerable period. I am a life member of one of the defendant fraternities, friendly with its national officers, recipient of a number of honors from it and quite active in its alumni affairs. My wife was a member of one of the defendant sororities and is quite active in its local alumni organization. hereby orders the case transferred for reassignment by the Clerk in accordance with Local Rule 2 or other applicable rule or order of this Court [28 U.S.C. §137]; and

IT IS FURTHER ORDERED that the Clerk this day forward copies of this Order by United States mail to the attorneys for the parties appearing in this cause.

August 16, 1967. /s/ Irving Hill
[Jurat] U. S. District Judge

INDEX.

PAGE

Statement of the case 2

Summary of argument 9

Argument 10

I. The rule of *Berger* v. *United States* 10

II. None of the affidavits of prejudice against respondent is legally sufficient 14

A. Affidavit of prejudice 14

B. Supplemental affidavit of prejudice 18

C. Second supplemental affidavit of prejudice 21

III. The instant disqualification proceeding is barred by the provision of 28 U. S. C., §144, that a party may file only one such affidavit in any case 22

Conclusion 26

Appendix A-1

Citations.

Cases:

Allen v. *duPont*, 75 F. Supp. 546 (D. C. Del., 1948) 25

American Steel Barrel Co., Ex parte, 230 U. S. 35 (1913) 11

Berger v. *United States*, 255 U. S. 22 (1921) 10, 11, 12, 22, 25

PAGE

Henry v. *Speer*, 201 Fed. 869 (5th Cir., 1913) 11

Martin v. *Texas Indemnity Insurance Co.*, 214 F. Supp. 477 (N. D. Tex., 1962) 25

United States v. *Hoffa*, 245 F. Supp. 772 (E. D. Tenn., 1965) 25

Statute:

28 U. S. C. §144 ..... 9, 10, 21, 22, 24, 25, 26, 27

In the

Supreme Court of the United States

October Term, 1969.

JAMES A. MURRAY AND EDITH B. MURRAY,
partners, doing business as NASSAU CHINA COMPANY,
Petitioners,

vs.

THE HONORABLE ROY W. HARPER,
Judge of the United States District Court for the Eastern and Western Districts of Missouri, *Respondent.*

BRIEF OF RESPONDENT ROY W. HARPER, DISTRICT JUDGE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1290.

Only the Hon. Roy W. Harper, Judge of the United States District Court for the Eastern and Western Districts of Missouri, is named respondent to this petition. The petition seeks review of the denial by the Court of Appeals for the Eighth Circuit of petitioners' petition therein for writ of prohibition or mandamus to compel respondent to disqualify himself as presiding judge in the cause styled *James A. Murray, et al.*, v. *L. G. Balfour*

Company, No. 737 in the United States District Court for the Western District of Missouri. Because L. G. Balfour Company was not a party to the proceeding in the Court of Appeals for the Eighth Circuit, review of which is sought by petitioners herein, it has no standing as a party in this Court in this proceeding. However, at the request of respondent its counsel have prepared for and on behalf of respondent the following brief in opposition to the petition for writ of certiorari.

In the Appendix hereto are set out in full certain portions of the record which are referred to in the petition or the certified record but not set out therein in full. References herein to the petition are identified as (Pet.); to petitioners' appendix as (Pet. A-); to the record in this case certified by the Court of Appeals for the Eighth Circuit as (R); and to respondent's appendix as (Resp. A- , infra).

STATEMENT OF THE CASE.

Petitioners are plaintiffs in *Murray, et al.,* v. *L. G. Balfour Company,* No. 737 in the United States District Court for the Western District of Missouri. The case is pending on the original complaint (Resp. A-12, infra). The professional legal fraternity, Delta Theta Phi, is not and has never been a party to that suit (Pet. 11; R. 136). All defendants named in that suit other than L. G. Balfour Company have been voluntarily dismissed by plaintiff (Resp. A-8, 9, infra). No process was ever issued or served upon any party defendant other than L. G. Balfour Company (Pet. 6).

Case No. 737 is one of 13 related antitrust cases described on page 5 (n. 2) of the petition herein. By Order entered May 19, 1967, and continued in effect thereafter, the cases are consolidated for all motions,

BLEED THROUGH, POOR COPY

pleadings, orders or other filings, which shall be deemed to apply equally to each of the actions as though individually filed therein (Pet. A-7).

Four district judges have presided in these cases including respondent. Two of them have been disqualified at the instance of plaintiffs.

On Judge Duncan's retirement in 1965, the cases were assigned to the Hon. John W. Oliver, Judge of the Western District of Missouri. Because Phi Delta Theta Fraternity was plaintiff in one of the related cases (No. 683), when the cases were transferred to Judge Oliver he advised all parties that he had joined Phi Delta Theta when a student some 30 years before and all parties, by their then counsel (including Mr. Spanos), expressly waived any right to raise any question concerning possible disqualification of him on that ground (Pet. A-16). Thereafter, the question of Judge Oliver's college membership in Phi Delta Theta was injected into the case by petitioners' counsel (Pet. 6, 7; A-17) and by reason of that fact, and in anticipation that an affidavit of bias would shortly be filed against him, Judge Oliver recused himself on April 1, 1968 (Pet. 6, 7; R 97, 98). The fact that Judge Oliver was disqualified for bias is admitted by petitioners (Pet. 7; R 98).

In petitioner Murray's affidavit relating to Judge Collinson (R 97), certain alleged information directed to Judge Oliver emanating from Mr. Spanos further illuminates the fact that Judge Oliver was forced to recuse himself by reason of claims of bias and prejudice asserted against him by Mr. Spanos, attorney for petitioners herein and for all of the plaintiffs in the related cases above described (R 96, 97). Indeed, in the Murray affidavit there is contained certain information relating to the alleged state of mind of District Judge Elmo B. Hunter of the Western District of Missouri which, no

doubt, was included to disqualify in advance Judge Hunter as the only remaining District Judge in the Western District qualified to preside in these cases, against the possibility of reassignment of these cases to him (R 96, 97).

Upon Judge Oliver's disqualification the consolidated cases were transferred to Judge Collinson on April 1, 1968 (Pet. A-17, 18). Judge Collinson attempted to process the cases toward trial (R 60, 62). On September 17, 1968, he entered an order requiring that defendant serve interrogatories and motions to produce on or before October 28, 1968 (R 62), which defendant did in all the related cases. Plaintiffs requested various extensions of time to respond which were granted, and Judge Collinson directed plaintiffs to comply at various times during January and February, 1969, which plaintiffs failed to do (R 66, 69). Plaintiffs moved to vacate the order of September 17, 1968, and Judge Collinson ordered a conference which was held on April 7, 1968 (R 69). Mr. Spanos, counsel for plaintiffs, including petitioners, withdrew from the conference and refused to participate in it in violation of the order of Judge Collinson. This resulted in the withdrawal of Mr. Spanos' associate counsel from the cases (R 70, 71). When plaintiffs' counsel refused to participate in the conference he was advised that, because of this disregard and disobedience of the court's orders, Judge Collinson would impose the sanction of dismissal upon plaintiffs (R 70). Before Judge Collinson had the opportunity to act and impose sanctions upon plaintiffs, plaintiff Buchroeder (No. 729) filed a motion for change of judge, affidavit of prejudice and certificate of good faith of counsel, all directed against Judge Collinson (R 71). On or about August 18, 1969, petitioner Murray filed his affidavit of prejudice also directed against Judge Collinson but alluding as well to alleged

improprieties by Judge Oliver and Judge Hunter, both of the Western District of Missouri (R 96, 97).

On the same date that the Buchroeder motion for change of judge and affidavit of prejudice were filed, there were served and filed by plaintiffs in all the related cases, including petitioners' case No. 737, a motion to stay all proceedings and memorandum in support thereof (Pet. A-6, 7; Resp. A-1-4, infra). In the motion to stay it was requested that all proceedings in all cases be stayed pending the final determination of the motion to change judge or until the filing in each of the related cases, including No. 737, of a similar motion. The motion was based upon the memorandum in support, the affidavit of prejudice by Buchroeder and all of the pleadings and papers in all of the related cases. The memorandum in support stated that all of the related cases in which it was captioned, including petitioners Murray case:

> "• • • have for many years been treated as a single group or unit because of the identity of issues although not of parties, and generally rulings made in one of the cases have been applicable to all of the cases in the group. The issues raised by the Motion to Change Judge filed in cases 683, 684 and 729 are common to all of the cases in the group, including the above identified cases, and the disposition of the said Motion to Change Judge in cases 683, 684 and 729 would be dispositive of the identical issues which exist in each of the above identified cases as well." (Pet. A-6, 7; Resp. A-3, 4, infra.)

The motion to stay and memorandum in support are signed by Mr. Spanos and Mr. Oberlander as attorneys for plaintiffs in all the related cases, including petitioners' case No. 737.

Judge Collinson disqualified himself by order print at Pet. A-13-15. In this order he stated:

> "• • • the reading of this affidavit from a judici viewpoint, with the knowledge that I had to acce these allegations as true and pass on their leg sufficiency, has been my most unpleasant experien in twenty years on the trial bench. However, I ce tainly would not want to preside at a trial at whi counsel for one of the parties felt about the Cou as, obviously, counsel for the movant must."

Because of their consolidation and the identity of t issues, Judge Collinson disqualified himself in all t related cases.

Because all of the district judges in the Weste District of Missouri were then disqualified (consideri the references to Judge Hunter in petitioner Murray affidavit directed to Judge Collinson, R 96, 97), t cases were transferred and assigned to respondent.

Respondent first met with counsel for the parties July 29, 1969. Three days later, on August 1, 19 Mr. Spanos, counsel for petitioners and all plaintiffs the related cases, wrote to respondent requesting that disqualify himself (Pet. 13, 14).

Plaintiffs, including petitioners, jointly moved th respondent vacate the order of September 17, 19 entered by Judge Collinson, which motion responde denied (Pet. 14).

Respondent entered a Pre-trial Order in all the relat cases on August 4, 1969, in which he ordered *inter a* that all parties proceed with their discovery and set t cases for trial beginning on February 16, 1970 (R 1 152, 153). All the plaintiffs, including petitioners, joint moved to vacate that order, which motion responde denied.

BLEED THROUGH, POOR COPY

On August 21, 1969, the petitioners herein filed their motion for change of judge, the affidavit of prejudice by Murray directed against respondent (R 37) and Exhibit A thereto, being the affidavit of prejudice by Murray directed against Judge Collinson and, incidentally, against Judges Oliver and Hunter as well (R 53, 96, 97).

On September 2, 1969, all of the plaintiffs other than petitioners moved the district court for an order staying all proceedings in each and all of the related cases pending the final determination of petitioners' motion to change judge, or until the filing in each case of a similar motion to change judge, stating that the motion to stay was made on the basis of the affidavit of prejudice by petitioner Murray, all of the other moving papers filed in connection with the motion in the Murray case and on the basis of all the pleadings and papers in each of the related cases (Pet. A-6, 7; Resp. A-5-8, infra). In support of the motion to stay, and concurrently therewith, all of the plaintiffs in the related cases filed a memorandum stating that because of the identity of the issues all of the cases have for many years been treated and handled as a single group or unit and rulings made in one of the cases have similarly been applicable to all of the cases in the group, that the issues raised in petitioners' motion to change judge are common to all of the cases in the group and disposition of the said motion would be dispositive of the identical issues which exist in each of the related cases (Pet. A-7).

On September 29, 1969, petitioners and all plaintiffs filed in this Court their application for stay of further district court proceedings in the related cases pending the filing of a petition for writ of certiorari in this Court for review of the denial by the Court of Appeals for the Eighth Circuit of petitioners' and plaintiffs' petition

therein for writ of mandamus or prohibition to review respondent's denial of petitioners' and plaintiffs' motion to vacate Judge Collinson's order of September 17, 1968, and respondent's order of August 4, 1969. The application for stay of proceedings was denied on October 7, 1969, by Mr. Justice White. No petition for certiorari concerning these matters have been filed in the Supreme Court of the United States.

Meanwhile, on September 8, 1969, respondent denied the motion for change of judge by memorandum opinion and order (Pet. A-2-11).

On October 14, 1969, petitioners filed in the district court their motion for rehearing for motion for change of judge (R 145), the affidavit of counsel as to good faith (R 147) and a further affidavit of prejudice (referred to in the motion for rehearing as the "Supplemental Affidavit of Prejudice") by Murray (R 133-144). In the supplemental affidavit it is not stated that the complaint in petitioners' case names Delta Theta Phi as a defendant (R 135). As stated above, that fraternity is not named as a defendant in petitioners' complaint and no amended complaint has been filed by petitioners. On October 17, 1969, respondent granted leave to plaintiffs to file amended complaints but petitioners Murray refused and declined to file an amended complaint, and have never filed an amended complaint at any time (Resp. A-11, 12, infra).

Respondent denied the motion for rehearing for motion of change of judge by order filed October 29, 1969 (Pet. A-11, 12).

On December 4, 1969, petitioners filed their petition for writ of mandamus or prohibition in the Court of Appeals for the Eighth Circuit (R 1) which was denied by order entered December 9, 1969 (Pet. A-1).

BLEED THROUGH POOR COPY

SUMMARY OF ARGUMENT.

I. 28 U. S. C., §144, and the decision of this Court in the *Berger* case require that the affidavit of prejudice state facts and reasons which give fair support to the charge that the accused judge is personally biased or prejudiced and it is the duty of the judge to pass on the sufficiency of the affidavit as a matter of law.

II. None of the affidavits of prejudice against respondent is legally sufficient:

A. The affidavit of prejudice does not state any fact or reason which gives fair support to the charge of personal bias or prejudice against petitioners or in favor of an adverse party.

B. The supplemental affidavit of prejudice does not state that Delta Theta Phi legal fraternity is a party to petitioners' case and respondent's membership in that fraternity is not a fact or reason which gives fair support to the charge that respondent is personally biased or prejudiced.

C. The second supplemental affidavit of prejudice is legally insufficient in that the charges therein relate only to respondent's rulings in the case, do not establish any personal bias or prejudice and the affidavit is barred by the provision of Title 28, U. S. C. §144 that a party may file only one such affidavit in any case.

III. The disqualification proceeding against respondent by petitioners is barred by the provision of 28 U. S. C., §144, that a party may file only one such affidavit in any case, in that prior disqualification proceedings in related cases which resulted in the disqualification of prior judges were adopted by petitioners as applicable to petitioners' action as though individually filed therein.

ARGUMENT.

I. The Rule of *Berger* v. *United States*.

Petitioners concede that 28 U. S. C., §144, and the decision of this Court in *Berger* v. *United States*, 255 U. S. 22, 41 Sup. Ct. 230, 65 L. Ed. 481 (1921), have been applied and interpreted by the courts of appeals and the district courts not to require automatic disqualification of a judge upon the filing of an affidavit of prejudice and certificate of counsel. Petitioners concede that the courts of appeals have interpreted the statute and the *Berger* ruling as imposing on the litigant the burden of alleging facts and reasons which give fair support to the charge that the accused judge is personally biased or prejudiced, and that it is the duty of the accused judge "to pass on the sufficiency of the affidavit as a matter of law" and to recuse himself only if the allegations "are sufficient to support the conclusion that the judge has a personal bias or prejudice against the defendant or in favor of the plaintiff" (Pet. 22, 23, and citations at 23). And petitioners concede that the memorandum opinions of respondent in this case follow and apply, and are consistent with, the interpretations and decisions of the courts of appeals and the district courts (Pet. 24, 25).

The thrust of petitioners' argument is that the rulings by the courts of appeals are inconsistent with the statute and with the rulings of this Court, particularly in the *Berger* case. However, the statute does not prescribe the automatism urged by petitioners, nor did the *Berger* case so interpret it.

The statute provides that the affidavit must be "sufficient," that it shall state "facts and the reasons for the belief that bias or prejudice exists," that is must be made and filed by a "party" and it must show "that the

BLEED THROUGH POOR COPY

judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." The affidavit must be accompanied by the certificate of counsel of record stating that it is made in good faith. A party may file only one such affidavit in any case.

The *Berger* case interprets the language of the statute (then Section 21 of the Judicial Code) as follows:

> "Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U. S. at p. 33, 34;
>
> "• • • the • • • provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice • • • is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion • • •" 255 U. S. at p. 33;
>
> "[Ex Parte American Steel Barrel Co., 230 U. S. 420, 32 Sup. Ct. 1007, 57 L. Ed. 1379] established that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." 255 U. S. at p. 31;
>
> "[In] *Henry* v. *Speer*, 201 Fed. 869, 120 C. C. A. 107, • • • a petition for mandamus • • • was refused on the ground that the affidavit did not conform to Section 21 in that it omitted to charge 'personal' bias, a charge of such bias, it was held, being a necessary condition." 255 U. S. at p. 32.

The court did hold that the section withdraws from the presiding judge a decision upon the truth of the matters alleged and that if the affidavit shows the objectionable inclination or disposition of the judge, it is his duty to proceed no further in the case. And the

COPY BOUND CLOSE IN CENTER

court stated clearly the considerations in the administration of justice which influenced its decision and reasons:

> "And in this there is no serious deteriment to the administration of justice nor inconvenience worthy of mention, for of what concern is there to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than 10 days before the commencement of the term."
>
> "* * * and the section in its care permits but 'one such affidavit'." 255 U. S. at p. 35.

On the facts of the *Berger* case there was no question but that the bias or prejudice allegedly harbored by the judge against the defendants there was *personal.* In that case there was a single affidavit directed to a single judge. Compare that with the instant case where the disqualification device has been used in respect to three district judges, the enforcement of their orders has been frustrated and avoided and, together with the strategy of interlocutory appeals and petitions, the prosecution of the case has been delayed for years.

In substance the *Berger* case holds that disqualification is not automatic upon the filing of the affidavit but the district judge has a lawful right to pass upon the sufficiency of the affidavit. This holding has been followed and applied by the lower courts. The *Berger* case holds that in passing upon the sufficiency of the affidavit the judge must determine that the affidavit states the facts and reasons for the belief of the existence of bias or prejudice, that the affidavit charges "personal" bias, a necessary condition, and that the reasons and facts stated for the litigants' belief *give fair support* to the charge of a bent of mind that may prevent or impede

impartiality of judgment. It is submitted that it is these holdings in the *Berger* case which have been applied by the courts of appeals and the district courts, and, as conceded by petitioners, were applied by respondent in his rulings on petitioners' motion and affidavits in this case.

The key phrases in the statute as interpreted by this Court are that the reasons and facts for the belief the litigant purportedly entertains are an essential part of the affidavit and *must give fair support* to the charge of a bent of mind that may prevent or impede impartiality of judgment, and the bias must be personal either against the affiant or in favor of any adverse party.

The requirement that the reasons and facts alleged must give fair support to the charge of a bent of mind places a burden upon the party affiant to demonstrate the charge by facts and reasons.

This is the burden which respondent ruled rests upon petitioners. This is the standard against which respondent ruled the sufficiency of petitioner's affidavit (Pet. A-5). It was clear in respondent's mind that, as ruled in the *Berger* case, the statute withdraws from the presiding judge a decision upon the truth of the matters alleged. In the Memorandum Opinion and Order, respondent states:

> "The court is precluded from refuting the facts alleged regardless of their nature. It cannot pass on their truth, but rather must accept them as fact. Hence, review is limited to sufficiency and compliance with the statute. [Citations]" (Pet. A-5).

II. None of the Affidavits of Prejudice Against Respondent Is Legally Sufficient.

A. The Affidavit of Prejudice.

Turning to the affidavit itself (R 37-51), respondent found that aside from the bare allegation that he has a personal bias and prejudice and is unable to exercise his judicial functions impartially and fairly, which he branded as a conclusion not a fact nor a reason, therefore legally insufficient to comply with the requirements of the statute to disqualify a judge, the first 11 paragraphs dealt with matters which occurred in these cases prior to respondent's entry into them (Pet. A-9). The affiant admits that the sole source of his information is his attorney, Mr. Spanos (who also executed the affidavit of counsel of record of good faith) (R 38, par. 4). Paragraph 5 is in the nature of a legal brief. Paragraph 6 expresses the affiant's opinion unsupported by any facts or reasons; hence, is indeed a conclusion, but it characterizes the affiant's belief that respondent has a personal bias and prejudice against all the antitrust plaintiffs and in favor of the antitrust defendant and refers not to the affiant's case but to the related cases collectively as a unit.

Paragraph 7 relates to the Buchroeder affidavit against Judge Collinson and Judge Collinson's memorandum disqualifying himself in which he states (R 41, 42):

> "The reading of this affidavit from a judicial viewpoint, with the knowledge that I had to accept these allegations as true, and pass on their legal sufficiency, has been my most unpleasant experience in twenty years on the trial bench."

Yet, in paragraph 7, the affiant criticizes Judge Collinson for failing to deny the allegations of the Buchroeder affidavit in his Order of July 3, 1969 (R 42).

Paragraph 8 further criticizes Judge Collinson for not ruling on the Buchroeder affidavit of prejudice from May 13, 1969, until July 3, 1969, and seems to infer some impropriety on the part of Judge Collinson for this delay. It is difficult to understand how this relates to respondent.

Paragraph 9 relates that petitioner Murray directed his attorneys to prepare an affidavit of prejudice against Judge Collinson for his signature. This is the affidavit filed in this case as Exhibit A to Murray's affidavit of prejudice against respondent. Its relevance to respondent is not obvious (R 53; Pet. A-8).

Paragraph 10 also relates to and incorporates into the affidavit against respondent, Exhibit A, Murray's affidavit against Judge Collinson.

In paragraph 11, petitioner alludes to a conference between respondent and counsel held in chambers at Kansas City on July 29, 1969, but states nothing in substance except that by alluding to "the Balfour cases" it confirms that the cases have been administered as a unit.

In paragraph 12, Mr. Spanos complains of the difficulties that he had had with Judge Collinson and Judge Oliver in not having a record made of even the most informal conferences. He concedes that on July 29, 1969, respondent came to Kansas City from St. Louis without bringing his reporter and complains that upon Mr. Spanos' request for a reporter none was available. There is no allegation that respondent knew of any prior request by Mr. Spanos nor Mr. Spanos' feelings in this regard toward Judge Oliver and Judge Collinson.

Paragraph 13 alleges that defendant's proposed "discovery program" is a sham and argues about plaintiffs' contentions that defendants were not entitled to any discovery by reason of Rule 6(b)(2), but states no fact

or reason supporting a charge of bias or prejudice on the part of respondent.

Paragraph 14 extends plaintiffs' arguments (and relates to all plaintiffs as a unit), conceding that Judge Collinson had found that plaintiffs had wrongfully obstructed defendant's discovery and that defendant, without any fault on its part, had been denied any opportunity for discovery throughout the period since February 20, 1959, and that in respect to defendant's discovery Judge Collinson had found that Mr. Spanos had dishonored a promise that he had made to Judge Collinson in open court at a hearing on December 16, 1968, not to object to discovery sought by defendant as ordered by the court on September 17, 1968. The paragraph states that on the basis of respondent's remarks at the conference of July 29, 1969, without stating what were the remarks, it was clear to Mr. Spanos that respondent intended to open up discovery in the cases. There is no statement of fact or reason in this paragraph which gives fair support to a charge of personal bias or prejudice on the part of respondent against the plaintiffs or in favor of the defendant.

Paragraph 15 alludes to possible sources of alleged but unsupported prejudgment by respondent. The first of these is an alleged revelation by respondent shortly after the conference on July 29, 1969, began that he had consulted Judge Collinson about "the Balfour cases." There is not a scintilla of allegation as to what the conversation consisted of, whether it was simply the fact that the cases had been assigned to respondent, or whatever. There is absolutely no fact stated to give fair support to the charge of a bent of mind of respondent that may prevent or impede impartiality of judgment.

Paragraphs 16, 17 and 18 state that the second possible source of "the origins of [respondent's] unwar-

BLEED THROUGH POOR COPY

ranted prejudgment" was a bundle of sheets of typewritten material to which respondent referred and advised the parties was a synopsis pre[illegible]ed for him by "the clerk." There is no allegation as to what the papers contained except the statements of respondent that they were nothing but a "brief reference to the various entries and filed papers in the cases * * * a prepared characterization * * * not binding upon anyone, as the original entries and documents speak for themselves" (R 50). None of the allegations in these paragraphs state any fact or reason which gives fair support to the charge of personal bias or prejudice in the mind of respondent.

Paragraph 19 simply states that three days after the parties, through their counsel, had first met respondent, and on August 1, 1969, Mr. Spanos, entirely on his own initiative and responsibility and not upon the initiative or the responsibility of any party, wrote to respondent expressing Mr. Spanos' opinion that respondent was disqualified and expressing Spanos' hope that respondent would voluntarily withdraw as presiding judge "thus making the filing of *another* affidavit of prejudice unnecessary." The only possible significance of this is twofold. First, it is a recognition that the plaintiffs as a unit had already disqualified the prior judges by affidavit of prejudice, hence the reference to "another" affidavit of prejudice; and, secondly, the affidavit of prejudice purportedly made by Murray directed against respondent was in fact made by Mr. Spanos, the attorney, and not a party, and expressed the opinions and beliefs of Mr. Spanos rather than of the parties, as can be seen to be true throughout the various affidavits filed in this case.

Clearly, there are no statements of fact or reason in the affidavit which give fair support to the charge of personal bias or prejudice in the mind of respondent

against petitioners Murray or any of the plaintiffs or in favor of the defendant in the case.

B. The Supplemental Affidavit of Prejudice.

Petitioners represent in their petition that Delta Theta Phi legal fraternity, of which respondent is a member, is a party defendant to petitioners' case. At page 3 they state that this fraternity "has been named but not served as a defendant in the litigation"; at page 5 they state that the instant case involves a claim of conspiracy with Delta Theta Phi, and at page 6 that this fraternity has been named as defendant in this litigation. At page 11 it is conceded that Delta Theta Phi was not named as a defendant in the original complaint, but it is stated that Delta Theta Phi has been named in the various amended complaints, including the one which petitioners obtained leave to file, without revealing to this Court that petitioners had refused to file an amended complaint and have never filed one (Resp. A-11, 12, infra). At pages 27 and 29 it is represented that this fraternity has been named as a defendant in this case and that it is a party to the case. At page 32 it is again represented that this fraternity is named as a party defendant, and on page 37 it is represented that this fraternity is one of the parties in the case.

These representations are untrue. Nor are they supported by the supplemental affidavit of prejudice. In that affidavit Murray states that "the complaint in my case charges an illegal conspiracy on the part of, among others, the L. G. Balfour Company ("Balfour" herein) and practically all of the leading college social and professional fraternities and sororities, including Judge Harper's fraternity, Delta Theta Phi" (R 135). However, petitioners concede that Delta Theta Phi, although it may in petitioners' minds have been included generally

BLEED THROUGH POOR COPY

as one of "practically all the leading college social and professional fraternities and sororities" as a group, was not expressly named in the complaint in petitioners' case (Pet. p. 11). Although petitioners represent that Delta Theta Phi is named in the amended complaint which petitioners sought leave of court to file in March, 1967, it is not stated in the affidavit that the amended complaint was ever filed. Indeed, the fact is that petitioners refused to file the amended complaint in their case when leave was granted plaintiffs in the related cases to file their amended complaints on October 17, 1969 (Resp. A-11, 12, infra).

The truth is that Delta Theta Phi fraternity is not now named as, nor has it ever been, a party to this case.

Furthermore, from as early as March 31, 1967, in the reply brief filed by Mr. Spanos in support of plaintiffs' (including petitioners) joint motion for leave to file amended complaints, it was represented to the court that no service would be attempted by plaintiffs on any fraternity and that no damages are being sought by these plaintiffs against any fraternity (Pet. A-11, 12). Further, in the plaintiffs' (including petitioners) reply to suggestions in opposition to plaintiffs' motion for leave to file amended and supplemental complaints, plaintiffs (including petitioners) represent that they do not intend to proceed against any of the fraternity or sorority defendants (Pet. A-11). See also Resp. A-10, 11, infra.

Indeed, all defendants in all the related cases, including petitioners' case, other than defendant L. G. Balfour Company, were voluntarily dismissed by all plaintiffs on January 19, 1970 (Resp. A-8, 9, infra).

Having incorrectly represented in their petition that Delta Theta Phi is and was a party defendant in petitioners' case, upon this erroneous hypothesis petitioners

COPY BOUND CLOSE IN CENTER

attempt to build and support a charge that respondent "had accepted his designation and had continued to participate and make rulings in the case without revealing the fact, which he was later forced to concede, that he is a member of a fraternity that has a direct interest in the outcome of the case and that has been named but not served as a defendant in the litigation" (Pet. 3); "knowingly concealed the fact of membership for some time after his assignment to these cases in July of 1969" (Pet. 28); and "neglected to reveal his membership in a fraternity named as a party defendant, until forced by the petitioners to admit his membership" (Pet. 32).

It is true that Judge Oliver was forced by petitioners' counsel to disqualify himself because he was a member of Phi Delta Theta fraternity. However, that fraternity was one of the plaintiffs in one of the related cases then pending and the question presented concerned discovery of a ritual of that fraternity (Pet. A-15, 18). Although petitioners argue that Judge Collinson disqualified himself because of his membership in Lambda Chi Alpha (Pet. 7, 28), this is an untenable position when viewed in the light of the statements made by Judge Collinson in his order filed July 3, 1969 (Pet. A-13), and the affidavit of prejudice of Buchroeder against him.

In view of the record there was no more occasion for respondent to have advised the parties before petitioners' request on September 21, 1969, that he was a member of Delta Theta Phi than to advise the parties that he was a Democrat or a Mason. These facts, together with his membership in Delta Theta Phi and the Order of the Coif, appear in his biography at page 952 in *Who's Who in America*, 1968-1969. It would be difficult to find any federal judge who was not at one time a member of one or more of "the leading college social and professional fraternities."

BLEED THROUGH POOR COPY

C. The Second Supplemental Affidavit of Prejudice.

Petitioners filed for the first time in the Court of Appeals for the Eighth Circuit as an exhibit to their petition for writ of mandamus or prohibition a "Second Supplemental Affidavit of Bias and Prejudice" (R 147). This affidavit purportedly supports their motion for change of judge and the petition for writ of mandamus or prohibition in respect to its denial, but it was never submitted to nor considered by respondent. As is shown in its caption, it is a "second supplemental affidavit" by this party. It should not be considered in view of the provision of Title 28, U. S. C. §144:

> "A party may file only one such affidavit in any case,"

and for the reason that it was never presented to the district court. Further, the "second supplemental affidavit" does not state any fact or reason which gives fair support to the charge of personal bias or prejudice on the part of respondent either against petitioners or in favor of any adverse party. Petitioners refer to rulings by the court, respondent's attempts to familiarize himself with the records in the cases, respondent's approach to problems in the litigation before he became the presiding judge, complaints about respondent's order entered August 4, 1969, proceedings in court held by Judge Collinson on December 16, 1968, respondent's ruling and failure to rule on certain motions, respondent's setting of the cases for trial, respondent's rulings on matters relating to discovery and a description of the forms for the clerk's minutes, none of which in any manner state facts or reasons which give fair support to the charge that respondent's bent of mind may prevent or impede impartiality of judgment. To the extent that these charges

relate to respondent, they have to do only with his rulings in the cases and in no way tend to establish any personal bias on his part in favor of any adverse party or against petitioners or the plaintiffs in the cases. *Berger* v. *United States, supra,* 255 U. S. at p. 31.

It is significant that throughout the affidavit all the references to the parties are as to "plaintiffs" collectively rather than to the petitioners herein. For example, it is stated that "*plaintiffs* had come to hold a number of grievances arising out of the conduct of the defendants and Judges Oliver and Collinson" (R 148-149), which contributed to *plaintiffs'* belief that the court had been biased and prejudiced and that had led to disqualification; and in respect to respondent's rulings and actions it is likewise complained that *plaintiffs* held the various grievances. This is further proof that the identical issues presented by the Buchroeder motion for change of judge and affidavit directed against Judge Collinson and the identical parties were involved there as here; that it is the feelings of the *plaintiffs,* through their attorney, that are relevant throughout the disqualification proceedings and that the provision of Title 28, U. S. C. §144 that a party may file only one such affidavit in any case bars the disqualification proceedings directed to respondent.

III. The Instant Disqualification Proceeding Is Barred by the Provision of 28 U. S. C., §144, That a Party May File Only One Such Affidavit in Any Case.

As shown in the statement of the case, the related cases, including petitioners' case (No. 737), and the Buchroeder cases (Nos. 683, 684 and 729) have been consolidated for all motions, pleadings, orders or other filings which are deemed to apply equally to each of the actions as though individually filed therein (Pet. A-7). Judge

BLEED THROUGH POOR COPY

Oliver was forced to recuse himself by reason of charges of bias and prejudice directed to him by counsel for plaintiffs, including Buchroeder and the petitioners herein. The cases were then transferred to Judge Collinson. After Judge Collinson had presided in the cases for little more than a year he advised counsel for plaintiffs, including petitioners, that he intended to dismiss the cases, whereupon a motion for change of judge and affidavit of prejudice against Judge Collinson by Buchroeder were filed by attorneys for all plaintiffs, including petitioners. In addition, an affidavit of prejudice directed to Judge Collinson was filed by Murray, one of the petitioners herein, as an exhibit to the affidavit of prejudice filed by him against respondent herein. On the same date that the Buchroeder affidavit of prejudice and motion for change of judge were filed there was also filed by all plaintiffs in the related cases, except Buchroeder but including petitioners, a motion for stay of all proceedings and suggestions in support thereof (Resp. A-1-4, infra). In this motion and the memorandum in support it was noted that the cases have been treated as a single group or unit, that the issues raised by the Buchroeder motion to change judge are common to all the cases in the group and that the disposition of the said motion would be dispositive of the identical issues which exist in all the related cases, including petitioners Murray case (No. 737).

After Judge Collinson disqualified himself from acting in all the related cases pursuant to the motion to change judge and the affidavit of prejudice, the cases were assigned to respondent. Respondent first met with counsel for all parties in Kansas City on July 29, 1969, and three days thereafter received a letter from counsel for all plaintiffs, including petitioners, requesting that re-

COPY BOUND CLOSE IN CENTER

spondent disqualify himself from the cases. Thereafter, there was filed a motion to change judge and affidavit of prejudice against respondent by petitioner Murray. Again, there were filed by counsel for all plaintiffs in the related cases a motion for stay of all proceedings and a memorandum in support again confirming that for many years the cases had been treated as a single group or unit, that rulings made in one case had been applicable to all of the cases, that the issues raised by the motion to change judge are common to all the cases and the disposition of the motion would be dispositive of the identical issues which exist in each of the cases. (Resp. A-5-8, infra).

After respondent denied petitioners' motion to change judge, a motion for rehearing was filed by petitioners accompanied by another affidavit of prejudice by petitioner Murray directed to respondent. After respondent denied the motion for rehearing, petitioners filed a petition for writ of mandamus or prohibition to the Court of Appeals for the Eighth Circuit to review that action and with that petition filed yet another affidavit of prejudice directed to respondent, but which had not been presented to respondent.

28 U. S. C., §144, clearly provides that a party may file only one affidavit of prejudice in any case. Here all plaintiffs, including petitioners, acknowledged that the cases were consolidated and were treated as a single unit or group, and that all motions, pleadings, orders and other filings are deemed to apply equally to each of the actions as though individually filed therein. Hence, the motion to change judge and affidavit of prejudice directed by Buchroeder against Judge Collinson are deemed to apply equally to each of the actions, including petitioners' case, as though individually filed therein. The

BLEED THROUGH POOR COPY

acceptance of this status by petitioners is clearly revealed by the motion to stay proceedings and the memorandum in support thereof filed by petitioners Murray together with the plaintiffs in the other related cases concurrently with the filing of the Buchroeder motion and affidavit. Clearly this represents an affidavit of prejudice as provided in 28 U. S. C., §144, by petitioners herein against Judge Collinson, which resulted in Judge Collinson's disqualification as presiding judge in the group of related cases.

Petitioners have pursued and had the one disqualification proceedings allowed by 28 U. S. C., §144. They are thus barred from further proceeding under the statute against respondent or any other district judge. As stated in the *Berger* case "* * * the section in its care permits but 'one such affidavit'." 255 U. S. at p. 35.

It has been observed by various federal courts that to permit successive disqualifications on successive affidavits of prejudice could rightly make judicial procedure the subject of ridicule and contempt. *Allen* v. *duPont* (D. C. Del., 1948), 75 F. Supp. 546. *United States* v. *Hoffa* (D. C. Tenn., 1965), 245 F. Supp. 772, at page 775 quotes from the *Allen* case (75 F. Supp. at 549) as follows:

> "If the affidavit filed in this case is to prevail conceivably every judge in the Federal system might in monotonous succession be given the same sort of passport and our judicial procedure be rightly made the subject of ridicule and contempt,"

and also from *Martin* v. *Texas Indemnity Insurance Co.* (D. C. Tex., 1962), 214 F. Supp. 477, 480:

> "28 U. S. C. A., Section 144, imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here."

Indeed, if the motion and affidavit prescribed in the section had the automatic effect urged by petitioners and could be used by various parties in the related cases in this litigation, our judicial procedure would be rightly made the subject of ridicule and contempt.

Here the disqualification procedure has already resulted in two changes of judge in the past two years and has frustrated the efforts of the respective district judges to process the cases toward trial or disposition.

Conclusion.

This Court in the *Berger* case noted the consideration which influenced its decision there, that the disqualification of a judge pursuant to the statute in question was of no serious detriment to the administration of justice nor inconvenience worthy of mention because it is of no concern to the judge nor to a party that he preside, that serious delay of trial is avoided by requirement of the statute and that the section in its care permits but "one such affidavit."

From the record in this case it is clear that those considerations are not present here. Here it is of concern to the parties and to the administration of justice that there be no further frustration of the judicial process by successive disqualification.

These considerations weigh against the automatism urged by petitioners for the affidavit provided by 28 U. S. C., §144. In these times of multiple party, complex litigation no case could be administered efficiently and justly if successive disqualification of judges were permitted.

It is submitted that in the successive affidavits of prejudice by petitioners herein there is stated no fact or reason which fairly supports personal bias or prejudice

BLEED THROUGH POOR COPY

on the part of respondent against petitioners or in favor of an adverse party.

For these reasons it is submitted that the petition for writ of certiorari should be denied. However, if it should be the disposition of this Court to accord 28 U. S. C., §144, the automatism urged by petitioners herein, then the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation rather than be deferred until after further proceedings are had in these cases.

Respectfully submitted,

EDWARD F. HOWREY,
A. DUNCAN WHITAKER,
KEITH E. PUGH, JR.,
1707 H Street, Northwest,
Washington, D. C. 20006,

THOMAS E. DEACY, JR.,
JOHN H. ROSS,
2300 Bryant Building,
Kansas City, Missouri 64106.

COPY BOUND CLOSE IN CENTER

APPENDIX.

In the United States District Court for the
Western District of Missouri
Western Division.

COLUMBUS STATIONERY COMPANY,
Plaintiff,

vs.

L. G. BALFOUR COMPANY, et al.,
Defendants.

and Related Cases Numbered 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

No. 736

MOTION TO STAY ALL PROCEEDINGS.

Come now the plaintiffs in the above identified cases and move the Court for an Order staying all proceedings in the said cases above identified pending the final determination of the Motion to Change Judge filed on May 13, 1969, in Cases bearing Docket Nos. 683, 684 and 729 currently pending before this Honorable Court, or until the filing in each of the above identified cases of a similar Motion to Change Judge in each of Cases bearing Docket Nos. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, whichever is sooner. This Motion is made on the basis of the Memorandum in support filed herewith, the Motion to Change Judge filed in said Cases 683, 684 and 729, the Affidavit of Prejudice executed by Mr. John A. Buchroeder in support of and filed with the said Motion to Change Judge, all of the other moving papers filed

with said Motion in Cases 683, 684 and 729, and all of the pleadings and papers in said Cases 683, 684 and 729, as well as all of the pleadings and papers in the above identified cases.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Plaintiffs in Cases No. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

Certificate of Service.

I hereby certify that service of the foregoing Motion to Stay all Proceedings and the Memorandum in support thereof, was made upon the plaintiff in Case No. 683, Phi Delta Theta Fraternity, by mailing a copy thereof, postage prepaid, to its attorneys and counsel, Thomas W. Van Dyke, Esquire, of Linde, Thomson, Van Dyke, Fairchild & Langworthy, 3rd Floor, Union National Bank Building, Kansas City, Missouri; on the plaintiffs in Case No. 684, Sigma Chi Corporation and Sigma Chi Fraternity, by mailing a copy thereof to their attorneys and counsel, Thomas J. Wheatley, Esq., of Kemp, Koontz, Clagett & Norquist, 1200 Commerce Tower, Kansas City, Missouri; and on the defendant, L. G. Balfour Company,

in Cases No. 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, by mailing a copy thereof to its attorneys, Howrey, Simon, Baker & Murchison, 1707 H Street Northwest, Washington, D. C., and the firm of Deacy and Deacy, 2300 Bryant Building, Kansas City, Missouri, this 13th day of May, 1969.

ROBERT G. OBERLANDER

In the United States District Court for the
Western District of Missouri
Western Division.

COLUMBUS STATIONERY COMPANY,
Plaintiff,

vs.

L. G. BALFOUR COMPANY, et al.,
Defendants.

and Related Cases Numbered 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

No. 736

MEMORANDUM IN SUPPORT OF MOTION TO STAY ALL PROCEEDINGS.

All of the above identified cases, together with Cases bearing Docket Nos. 683, 684 and 729, are pending before the Honorable William R. Collinson, United States District Judge. All of the said cases have for many years been treated and handled as a single group or unit because of the identity of issues although not of parties, and generally rulings made in one of the cases have

been applicable to all of the cases in the group. The issues raised by the Motion to Change Judge filed in Cases 683, 684 and 729 are common to all of the cases in the group, including the above identified cases, and the disposition of the said Motion to Change Judge in Cases 683, 684 and 729 would be dispositive of the identical issues which exist in each of the above identified cases as well.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Plaintiffs in Cases No. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,* vs. L. G. BALFOUR COMPANY, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 751 792 752 1193 753 1194

MOTION TO STAY ALL PROCEEDINGS.

Come now the plaintiffs in the above identified cases and move the Court for an order staying all proceedings in each and all of the said cases, above identified, pending the final determination of the "Motion to Change Judge" filed on August 21, 1969, in *James A. Murray and Edith B. Murray, partners, d/b/a Nassau China Company* v. *Lloyd G. Balfour et al.*, Civil Action No. 737 currently pending before this Honorable Court, or as to each of the above identified cases, until the filing in each such case of a similar motion to change judge, whichever is sooner. This Motion is made on the basis of a Memorandum in Support filed herewith, the "Motion to Change Judge," filed in said Case No. 737, the Affidavit of Prejudice executed by Mr. James A. Murray and filed in said Case No. 737 in support of said "Motion to Change Judge" therein and all of the other moving papers filed in connection with said Motion in said Case No. 737, and, in addition, on the basis of all the pleadings and papers in each and all of the above identified cases

as well as those in Cases Nos. 683 and 684, which are also currently pending before this Honorable Court.

Dated this 29th day of August, 1969.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Moving Parties.

Certificate of Service.

I hereby certify that service of the foregoing Motion to Stay All Proceedings was made upon the plaintiff in Case No. 683, Phi Delta Theta Fraternity, by mailing a copy thereof, postage prepaid, to its attorneys and counsel, Thomas W. Van Dyke, Esquire, of Linde, Thomson, Van Dyke, Fairchild & Langworthy, 3rd Floor, Union National Bank Building, Kansas City, Missouri; on the plaintiffs Case No. 684, Sigma Chi Corporation and Sigma Chi Fraternity, by mailing a copy thereof to their attorneys and counsel, Thomas J. Wheatley, Esquire, of Kemp, Koontz, Clagett & Norquist, 1200 Commerce Tower Kansas City, Missouri; on the defendant L. G. Balfour Company in Cases Nos. 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, by mailing a copy thereof to its attorneys, the firm of Howrey, Simon, Baker & Murchison, 1707 H Street, N. W., Washington, D. C.

20006; and the firm of Deacy & Deacy, 2300 Bryant Building, Kansas City, Missouri, this 2nd day of September, 1969.

DOROTHY J. HARDESTY

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,* vs. L. G. BALFOUR COMPANY, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 751 792 752 1193 753 1194

MEMORANDUM IN SUPPORT OF MOTION TO STAY ALL PROCEEDINGS.

All of the above identified cases, together with Case No. 737, are pending before the Honorable Roy W. Harper, United States District Judge. Because of the identity of the issues, although not of the parties, all of the said cases have for many years been treated and handled as a single group or unit and rulings made in one of the cases have similarly been applicable to all of the cases in the group. The issues raised by the "Motion to Change Judge" in Case No. 737 are common to all of the cases in the group, including the above identified cases and the

disposition of the said "Motion to Change Judge" in Case No. 737, would be dispositive of the identical issues which exist in each of the above identified cases, as well.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Moving Parties.

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,*	Nos. 729 754 736 755
vs.	737 792
L. G. BALFOUR COMPANY, et al., *Defendants.*	751 1193 752 1194
and Related Cases.	753

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO DESIGNATED PARTIES ONLY.

Come now plaintiffs in each of the above-captioned cases and, pursuant to the provisions of F.R.C.P. 41(a) (1) (i), file

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

of plaintiffs' causes of action as against the remaining defendants except L. G. Balfour Company, plaintiffs hereby reserving, retaining and continuing their actions against the defendant L. G. Balfour Company.

NICK C. SPANOS
6361 Wilshire Boulevard
Los Angeles, Calif. 90048

and

SHOOK, HARDY, OTTMAN,
MITCHELL & BACON

By LANE D. BAUER

JOHN C. DODS
915 Grand Avenue
Kansas City, Mo. 64106
BA 1-3611

Attorneys for Plaintiff.

Certificate of Service.

This is to certify that a copy of the foregoing Notice of Voluntary Dismissal was personally delivered to Thomas E. Deacy, Jr., Deacy and Deacy, and to Keith E. Pugh, Jr., Howrey, Simon, Baker & Murchison, attorneys for defendant L. G. Balfour Company, this 19th day of January, 1970.

JOHN C. DODS

In the United States District Court
Western District of Missouri
Western Division.

J. A. Buchroeder & Company *Plaintiff,* vs. L. G. Balfour Company, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 737 792 751 1193 752 1194 753

TRANSCRIPT OF PROCEEDINGS.

Be It Remembered, that at 1:00 o'clock p.m. of Friday, October 17, 1969, at the United States Court House, Kansas City, Missouri, the following proceedings were had before the Honorable Roy W. Harper, District Judge for the Eastern District of Missouri.

Appearances.

Mr. Nick C. Spanos, attorney at law, 6404 Wilshire Boulevard, Los Angeles, California 90048.

Messrs. Thomas E. Deacy, Jr., and John H. Ross III of the law firm of Deacy and Deacy, 2300 Bryant Building, 1102 Grand Avenue, Kansas City, Missouri 64106.

Messrs. Keith E. Pugh, Jr., and A. Duncan Whitaker of the law firm of Howrey, Simon, Baker & Murchison, 1707 H Street, N. W., Washington, D. C. 20006.

Mr. Thomas J. Wheatley of the law firm of Kemp Koontz, Clagett & Norquist, 1200 Commerce Tower Building, Kansas City, Missouri 64199.

Mr. Thomas W. Van Dyke of the law firm of Linde,

Thomson, Van Dyke, Fairchild & Langworthy, Floor 3, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106.

Mr. Arthur C. Popham, Jr., of the law firm of Popham, Thompson, Popham, Trusty & Conway, 13th Floor, Commerce Trust Building, Kansas City, Missouri 64106.

* * * * * * *

(Transcript page 24)

"MR. SPANOS: I would say substantially that is it.

Now, your Honor, on the serving of the fraternities that are named as defendants, the decision to list the fraternities was made before I came into these cases, then there was a problem whether to serve them or not, and there was a lot of indecision about it, largely because most of the plaintiffs, I think practically all of them at that time, were doing business with the fraternities, and did not want to incur the ill will of the membership for something they didn't think the members were really to blame for, so we decided not to serve them, and it went on like that, and finally it reached the point where to reverse that decision and to serve the fraternities would have opened up the door, well, a couple more years before you could get to trial, so we made the representations that your Honor saw in the file in writing, and we repeated them and confirmed them again last December 16th, at the hearing before Judge Collinson, and it was not my intention to serve the other defendants, nor is it my intention now to serve them; * * *"

* * * * * * *

(Transcript page 33)

"MR. DEACY: Now, your Honor, I understand that you have today granted leave to the plaintiffs to file amended complaints?

THE COURT: The ones that are in the file; they're here.

MR. DEACY: Are they filed? I don't think there have any been filed.

THE COURT: Well, there's a motion for permission to file, and I'm going to give them permission to file. There's the whole outfit right there. I'm going to sustain that motion.

MR. DEACY: Are they taken to be filed as of today or will the plaintiffs now come in if they see fit and file some?

MR. SPANOS: Everyone will be filed except Mr. Murray's. I have instructions not to file his amended complaint.

MR. DEACY: Are you going to file amended complaints?

MR. SPANOS: I just now said we will file all the amended complaints which we sought leave to file.

THE COURT: Except Mr. Murray's.

MR. SPANOS: Except Mr. Murray's."

• • • • • • •

Certificate.

I, OLIVE L. POOLE, Official Court Reporter, Division 1, United States District Court for the Eastern District of Missouri, Eastern Division, do certify that I was present at the time and place set forth in the caption sheet hereof and took down in stenotype all of the proceedings in connection with the matters herein, that I thereafter transcribed the same into typewriting and that the foregoing pages 2 to 35, inclusive, are a true and complete transcription of my stenotype notes.

OLIVE L. POOLE

E COPY

FILED
APR 29 1970

IN THE

Supreme Court of the United States

October Term, 1969

No. 1290

JAMES A. MURRAY and EDITH B. MURRAY,
partners, doing business as
NASSAU CHINA COMPANY,
Petitioners,

v.

THE HONORABLE ROY W. HARPER,
Judge of the United States District Court for
the Eastern and Western Districts of Missouri,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
The Eighth Circuit

PETITIONERS' REPLY BRIEF

NICK C. SPANOS
6404 Wilshire Boulevard
Los Angeles, California 90048

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioners

IN THE

Supreme Court of the United States

October Term, 1969

No. 1290

JAMES A. MURRAY and EDITH B. MURRAY,
partners, doing business as
NASSAU CHINA COMPANY,
Petitioners,

v.

THE HONORABLE ROY W. HARPER,
Judge of the United States District Court for
the Eastern and Western Districts of Missouri,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

---

PETITIONERS' REPLY BRIEF

The very fact [Opp. Br. 2] that the brief in opposition was prepared by counsel for L. G. Balfour Co. at the request of and on behalf of the respondent judge, Hon. Roy W. Harper, highlights the critical problem in this case. In the context of a proceeding that challenges the impartiality of the respondent judge, he has seen fit to employ as

his counsel before this Court the attorneys for the private party whose cause he has allegedly favored. In so doing, he has engaged in "ex parte discussions with [such] counsel," aligned "himself even temporarily with one side in pending litigation,' and thus further emphasized "the appearance of loss of impartiality" – all of which procedure was condemned by the Third Circuit in *Rapp v. Van Dusen*, 350 F.2d 806, 813-814 (1965).[1] Such a consequence of assuming a litigant's position has been deemed "unfortunate" by this Court. *Ex parte Fahey*, 332 U. S. 258, 260 (1947). But in a case where the propriety of the judge's participation is under question, such involvement can only add to "the appearance of loss of impartiality," an appearance that is at the very heart of 28 U. S. C. § 144.

But wholly apart from the partisan stance exhibited before this Court by the respondent judge, the brief in opposition reveals quite vividly the appropriateness of granting certiorari. Time and again the brief (see pp. 14, 15,

---

[1] Instead of employing partisan counsel who represent the party in whose favor he is allegedly biased, the respondent judge could have obtained independent personal counsel or left his defense before this Court to one of the litigants before him. See *Ex parte Fahey*, 332 U. S. 258, 260 (1947). He could also have filed his own brief statement or remained silent. See *United States v. Smith*, 331 U. S. 469 (1947). Or he could have requested representation by the United States Attorney or the Solicitor General. See *Platt v. Minnesota Mining Co.*, 376 U. S. 240 (1964).

Moreover, under Rule 21(b) of the Federal Rules of Appellate Procedure, the defendant L. G. Balfour Co. was deemed a party to the mandamus proceedings in the Eighth Circuit "for all purposes" and hence entitled to appear before this Court as a party in interest with respect to the petition for certiorari. See also Rule 31(3) of the Rules of this Court. Copies of the petition for certiorari were duly served on the Solicitor General and on counsel for L. G. Balfour Co.

BLEED THROUGH POOR COPY

16, 17, 18, 20, 21, 22) disputes the merits of petitioner Murray's allegations of bias and prejudice, asserting that some of those representations "are untrue" and that none "state any fact or reason which gives fair support to the charge of personal bias or prejudice in the mind of respondent." Moreover, certain of the references in that brief to the affidavits of prejudice are inaccurate, such as the repeated statements (Opp. Br. 4-5, 6, 7) that the petitioners had charged improprieties to Judge Hunter – who has never been assigned to the Balfour cases.[2]

Respondent's brief illustrates how easily involvement by the accused judge in ruling on his own disqualification can assume the appearance of a direct personal confrontation between judge and litigant on an issue that in such a context is inevitably demeaning for the court. It was precisely such a confrontation that § 144 and *Berger* intended to avoid. By "giving an automatism to the affidavit which overrides everything," said this Court in *Berger*, 255 U. S. at 33, § 144 removes from the accused judge "the delicate and trying duty of deciding upon the question of his own disqualification."

---

[2] The petitioners at no time have alleged any improprieties on the part of Judge Hunter. The only significant mention of Judge Hunter in the affidavits filed below (see paragraph 32 of Exhibit A attached to Murray's original affidavit of prejudice) related to Judge Oliver's attempt in 1968 to persuade the antitrust plaintiffs that it was in their interest that Judge Oliver continue to preside over these cases – otherwise, said Judge Oliver, the cases might be assigned to Judge Hunter who, in Judge Oliver's words, was not as "plaintiff minded" as Judge Oliver, was not professionally qualified to try antitrust cases, and disliked plaintiffs' counsel. The plaintiffs had no reason to adopt or share these derogatory remarks.

At this juncture of the case, petitioners do not deem it appropriate to answer other misstatements or misinterpretations in the brief in opposition relative to the assertions in the Murray affidavits. Such erroneous comments in the brief do not affect the appropriateness of the grant of certiorari.

The judge is thereby saved from becoming personally embroiled in the many major and petty factual disputes which are possible on the disqualification issue, such as those set forth in the brief in opposition. The automatism of the affidavit transfers such issues and any dispute as to the truth, substantiality or sufficiency of the allegation of prejudice away from the § 144 disqualification proceedings to a subsequent and altogether different arena in which the judge personally is no longer a contestant. There the focus is on the conduct not of the judge but of the affiant and his counsel. There they may find themselves required to defend against disciplinary and penal sanctions for having made and certified untruthful or frivolous charges of bias against the judge. See *Berger*, 255 U. S. at 33.

Thus the criticisms of the affidavits, advanced on behalf of Judge Harper before this Court in the brief in opposition, can have relevance under the *Berger* ruling only in the context of some effort to punish petitioners or counsel for abusing the privilege of securing an automatic disqualification under § 144. Significantly, no such effort has been made.

This urge to adjudicate the merits of the allegations of bias, which permeates both the opinions of Judge Harper and his brief before this Court, has so infected the lower courts that the plain meaning of § 144 and the *Berger* ruling has been lost. Those courts and Judge Harper have sought to treat the motion for disqualification and the supporting affidavit as documents to be "submitted for decision and the exercise of judicial judgment upon them," like other motions and their supporting evidence. But such treatment of the motion and affidavit was precisely the position advanced by the Government in *Berger* and expressly rejected by this Court. 255 U. S. at 30-31. And somewhat surprisingly, the post-*Berger* decisions have failed to recognize their own resurrection of this discredited position, perhaps because the matter was not urged

BLEED THROUGH POOR COPY

before them. In any event, the discrepancy that has emerged between the *Berger* ruling and the subsequent lower court rulings is so gross, and involves so recurring a problem, that the grant of certiorari becomes appropriate here to permit a re-evaluation of the problem and an elimination of the discrepancy.

Particularly is a resolution of the problem appropriate in the context of multi-party litigation. Where, as here, there are numerous party plaintiffs in separate but related lawsuits, is each such party entitled to one automatic disqualification? Or does the one-affidavit rule of § 144, which permits "a party" to file "only one such affidavit in any case," allow only one affidavit by the combined parties in multi-party litigation? None of the cases cited by Judge Harper in his opinion below or in his brief in opposition (p. 25) faces up to or answers that question. Nor does Judge Harper's opinion or brief refute the constitutional due process question that arises if a co-plaintiff is denied the right to seek disqualification of a successor judge who, subsequent to the disqualification of his predecessor on the basis of a §144 affidavit of another plaintiff in a separate case, exhibits a new and different pattern of prejudice against him. The complaint in that brief in opposition (p. 26) that no multi-party litigation could be administered efficiently and justly if successive disqualification of judges were permitted finds its complete refutation in the sanctions available for abuse of the disqualification principles – sanctions that can be utilized in either single-party or multi-party situations.

A final few words should be added with reference to Judge Harper's complaint (Opp. Br. 20) that it would be difficult to find any federal judge who was not at one time a member of a leading social or professional fraternity. However true that statement may be, it does not appear by reason of its truth or otherwise that there will be any scarcity of qualified judges to sit in the Balfour

cases by virtue of the operation of § 144. This is not a proceeding to disqualify a judge under 28 U.S.C. § 455 for having a substantial interest in the case or being connected with a party to the case. This case involves, rather, 28 U.S.C. § 144, and that section permits only one disqualification to each party for bias and prejudice and that section is activated only in the discretion of the affected party.

To illustrate the limited impact of the principle petitioners here urge, a total of eleven federal judges – three identifiable circuit judges and eight district judges – have been assigned either to preside over or to hear an appeal in some one or more of the 15 substantially identical cases filed against Balfour and the fraternities by the plaintiffs, who have been represented by the same counsel.[3] Many of those judges conceivably may have been fraternity members. But the plaintiffs have filed disqualification affidavits against only two of the eight district judges.

---

[3] The 11 cases in the Western District of Missouri have been successively assigned first to Judge Duncan, then to Judge Oliver, then to Judge Collinson, and finally to Judge Harper. The *Meyers* case in the Central District of California (see Petition, pp. 7, A-19) was, after Judge Hill recused himself, assigned to Judge Pregerson. The two cases filed on October 7, 1967, in the District of Massachusetts by two of the Kansas City plaintiffs were assigned to Judge Julian and are currently pending before him. In addition, in June of 1967, *Rader v. L. G. Balfour Co., et al.*, was filed in the Northern District of Illinois and assigned to Judge Napoli, who thereafter dismissed the action on Balfour's motion. This dismissal was appealed to the Seventh Circuit and, on May 13, 1969, three judges of that court heard the oral argument; the appeal is now under advisement.

Thus, except for Judge Oliver and the two judges (Collinson and Harper) against whom affidavits of bias have been filed, there has not been the slightest suggestion of any belief on the part of any plaintiff or any of plaintiffs' counsel that any of the judges above identified were disqualified by reason of possible fraternity membership or otherwise to act on the cases before them.

Moreover, the fact of fraternity membership was only one of several "facts and reasons" listed in the affidavits filed with reference to the two district judges. Indeed, the first affidavit filed below by petitioner Murray against Judge Harper made no mention of all of the judge's fraternal connection, which was then unknown to Murray. Even in Murray's second affidavit, after the connection had been revealed, the allegation of bias related to far more than mere membership. Rather it concerned (1) Judge Harper's failure to reveal such membership following the disqualification of two prior judges because of such membership, (2) his membership in a fraternity which, on a gratuitous claim that its "rights" were in jeopardy by reason of charges substantially the same as those involved in the instant litigation, had deliberately injected itself into the Seventh Circuit proceeding to take Balfour's side in the appeal from the F.T.C. decision against Balfour, and (3) his membership in a fraternity that, while not named as a defendant in petitioner's complaint, is named as a defendant in all other proceedings that the respondent judge has treated as related in nature.[4] It is in those circumstances that disqualification should have been ordered in this case.

---

[4] The respondent's complaint [Opp. Br. 18] that petitioners erroneously represented in the petition for certiorari that Delta Theta Phi is a named defendant in the instant *Murray* case is misplaced. The petition made clear (see p. 11) what the record shows – that "while Delta Theta Phi had not been expressly named in the original complaints in the various Balfour cases, it had been so named in the various amended complaints, including the one which petitioners obtained leave to file." Thus, while petitioners did not file an amended complaint, the other antitrust plaintiffs did so file and named Delta Theta Phi as a defendant. Delta Theta Phi is thus a named defendant in the Balfour litigation, in which Judge Harper concedes [Opp. Br. 24; Petition A-6, A-7] the *Murray* case forms an integral component.

The brief in opposition (p. 27) concludes with the observation that "if it should be the disposition of the Court to accord 28 U.S.C., § 144, the automatism urged by petitioners herein, then the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation rather than be deferred until after further proceedings are had in these cases." Implicit in that statement on behalf of Judge Harper is (1) a recognition that petitioners' position respecting the automatic nature of the disqualification procedure of § 144 is both rational and respectable, and (2) a recognition that this important problem should be resolved here and now.

Indeed, this Court's decision in the *Berger* case supports both of those considerations. As should now be evident from the petition for certiorari, the *Berger* ruling, despite the contrary interpretations of most lower federal courts and of Judge Harper, can most fairly be construed as according an automatism to § 144, a result in accord with the somewhat sparse legislative history. Moreover, *Berger* made plain that questions concerning the disqualification of a trial judge should be resolved prior to the trial, the Court stating that "the remedy by appeal is inadequate." 255 U.S. at 36. Such inadequacy is particularly evident in the instant Balfour cases, where the first of 11 separate and consecutive trials is now scheduled to commence late in 1970. A substantial waste of judicial time will ensue, to say nothing of the energies and expenses of the parties and their counsel, if the disqualification issue were to be deferred to the appeal stage and were then to be resolved as petitioners now urge. Indeed, in that event the financial resources of the antitrust plaintiffs would have been so depleted by the pre-trial proceedings and by the useless trial proceedings as to render it impossible for them to proceed anew before a qualified judge; the antitrust remedies would then have been rendered illusory.

Judge Harper is entirely correct in stating that "the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation." Opp. Br. 27.

For these reasons, supplementing those in the petition for certiorari, the writ should issue to review the judgment of the Eighth Circuit in this proceeding.

Respectfully submitted,

NICK C. SPANOS
6404 Wilshire Boulevard
Los Angeles, California 90048

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioners